

Missouri Attorney General's Opinions - 1944

| Opinion | Date | Topic | Summary |
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| 3-44 | Jan 11 | PENAL INSTITUTIONS —OUTSTANDING DUPLICATE DRAFT. | Statute provides no way to clear records on outstanding duplicate draft. |
| 3-44 | Jan 12 | STATE TREASURER— AUTHORITY AS TO OUTSTANDING CHECKS. | Where State Treasurer issued a check as provided by statutes and the same is lost, he may require bond before issuing duplicate check— Commissioners of the Department of Penal Institution shall have power to execute such bond. |
| 3-44 | Apr 21 | BONDS. | Penal Commissioners personally liable on bond to State Treasurer. |
| 3-44 | Oct 6 | PENAL INSTITUTIONS. | Agricultural products produced by convict labor can be shipped to another state for use by that state. |
| 5-44 | Apr 19 | ELECTIONS. | Candidate can seek nomination for more than one office on the same party ticket. |
| 7-44 | Jan 6 | BONDS. | 1) Payment of premium on surety bond not mandatory on county court. 2) County court not authorized to pay part of bond premium. |
| 7-44 | Nov 17 | SPECIAL ROAD DISTRICT. OFFICERS. | Unless the statutes prescribe a salary for the treasurer of a special road district, his services are deemed to be gratuitous. |
| 9-44 | Mar 21 | HABEAS CORPUS AD PROSEQUENDUM. | The appearance of persons imprisoned may be secured by writ of habeas corpus ad prosequendum in order to prosecute them on indictments for a felony in another jurisdiction in Missouri. |
| 9-44 | Sept 14 | RECORDER OF DEEDS. | Must collect and account for fees for recording deeds and other instruments recorded by county. |
| 10-44 | Aug 24 | CONSERVATION COMMISSION. CONSTITUTION. | Conservation Commission is unauthorized to pay out public funds for a short-term insurance policy on conservation agents for two-day open deer season. |
| 11-44 | Mar 22 | STATUTE OF LIMITATIONS. | Under Section 1015, R. S. Mo., 1939, actions against circuit clerk and ex-officio recorder for liability incurred by acts in official capacity must be brought within three years from date cause accrues in the absence of a showing of fraud or concealment. |
| 12-44 | Apr 20 | PRIMARY. CANDIDATES. | Last filing date for candidates for August 1944 primary is April 25, 1944. |
| 12-44 | Apr 28 | SCHOOLS. | Judges and Clerks of School elections not criminally liable for opening ballot boxes after school election, provided there is no violation of Sec. |

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| | | | 4357, R.S. Mo., 1939. |
| 13-44 | Feb 15 | PROBATION AND PAROLE. DESTRUCTION OF RECORDS. | Board of Probation and Parole has no authority to destroy permanent files and records of department. |
| 13-44 | Mar 7 | CHILDREN. ADOPTION. | Court is authorized under Section 9611B, Laws of 1941, page 319, to issue order allowing inspection of records and files in adoption cases. |
| 13-44 | Nov 21 | CRIMINAL LAW. | Officers of Board of Probation and Parole may not exercise powers of arrest provided by Sec. 9162, R. S. Mo., 1939, as far as judicial paroles are concerned. |
| 14-44 | Mar 22 | APPROPRIATION. KOCH HOSPITAL, ST. LOUIS, MO. | Section 7 of the Appropriation Act of 1943, Laws of 1943, Page 22 and 23, and Section 15181, Revised Statutes of Missouri, 1939, construed. |
| 16-44 | Aug 22 | TOWNSHIP ORGANIZATION. | Annual settlement with the county clerk by township trustee required by Section 13967, R. S. Mo. 1939, but audit of the books and accounts of the township trustee by the county clerk is not required by law. |
| 16-44 | Sept 20 | CONFEDERATE HOME. | In the event of failure of Legislature to comply with terms of deed and statute in maintaining Home and its inmates, State's title cannot be divested without consent of Legislature. |
| 16-44 | Oct 13 | SCHOOL DISTRICTS. | School Board has no power to spend district's money for public road purposes. |
| 18-44 | Jan 24 | Captain Osro Cobb | WITHDRAWN |
| 18-44 | May 1 | ELECTIONS. | Declaration of candidacy required by Sec. 11550 R. S. Mo., 1939, may be signed and filed by duly authorized agent. |
| 19-44 | Mar 8 | TAXATION AND REVENUE. | Tax deed conveying land of army inductee should not be made and delivered until after full compliance with Soldiers' and Sailors' Relief Act. |
| 19-44 | Mar 25 | HOSPITALS. MUNICIPALITIES. | City ordinance did not provide authority for use of hospital fund in the erection of an addition. If doubt arises out of the use of words employed, it is to be resolved in favor of the public and in favor of limiting the expenditures of the appropriation to the express terms for which it was made. |
| 19-44 | Sept 21 | Mr. Robert L. Cowan | WITHDRAWN |
| 20-44 | Jan 20 | TAXATION. | County Court cannot increase a year's tax levy to produce an amount in excess of 10% of the previous year's levy; how illegally paid tax can be recovered. |
| 20-44 | Feb 16 | SCHOOLS. | Directors of Consolidated Schools may not invest surplus building funds |

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| | | DIRECTORS. | in United States Bonds. |
| 20-44 | Mar 22 | SPECIAL ROAD DISTRICTS. | Current revenue may be applied only to current debts, and back and outstanding warrants may be paid only from surplus and delinquent taxes. |
| 20-44 | June 12 | PUBLIC OFFICERS. | Section 10342 A, Laws of Mo., 1943, p. 890, is not retroactive in requiring terms of new teacher's contract to be same as terms of teacher's contract for year preceding effective date of act. |
| 22-44 | Aug 15 | ELECTIONS. ABSENTEE BALLOTS. | If a person in the armed services of the United States applies only for a primary election ballot, he would not automatically be entitled to have a general election ballot forwarded to him without a new application therefor. |
| 24-44 | Jan 25 | ELECTIONS. | Amending absentee voting laws. |
| 24-44 | Jan 26 | PURCHASING AGENT. | An employee of a department may be designated to certify as to sufficiency of appropriations and allotments on purchases through purchasing agent. |
| 24-44 | Jan 31 | APPROPRIATIONS. | Deficiency bill pay tuition of Negro students at out-state schools, is valid, even tho obligation was illegally incurred. |
| 24-44 | Feb 1 | COUNTY SUPERINTENDENT OF PUBLIC SCHOOLS. | In determining qualifications of county superintendent for public schools as to whether this officer has taught or supervised schools as his chief work at least two of the eight years next preceding election or appointment, the sum derived by adding one school year to a number of days accumulated during the course of eight years is authorized by this statute. Aggregate of teaching or supervision must be the total of two years and must be taken from the eight years preceding election or appointment. |
| 24-44 | Feb 3 | APPROPRIATIONS. | House Bills 408 and 657: Consistent concurrent appropriations are not prohibited; Department of Resources and Development has charge of State Museum or Missouri Resources Museum. |
| 24-44 | Feb 11 | COUNTY SUPERINTENDENT OF SCHOOLS. | Qualification requirements prescribed in Section 10609 of House Bill No. 94, page 891. Laws of Missouri, 1943, for County Superintendent of public schools have been met by Mrs. Nannie Coward. |
| 24-44 | Mar 30 | APPROPRIATIONS. | Funds appropriated by House Bill 4, 62nd General Assembly, Extra Session, only available to State Board of Education, but that Board may allot funds to Commission for Blind for rehabilitation purposes. |
| 24-44 | Apr 7 | STATUTES IN EXPERIENCE. | Statutes should be construed broadly enough to carry out intention of Legislature. Sec. 8195, R. S. 1939, does not confine those eligible for appointment to those experiences "within" the building & loan business. |
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| 24-44 | Apr 19 | CONSTITUTION. GOVERNOR'S SPECIAL MESSAGE. | House Bill No. 15 constitutional; the amendment comes within the terms of the Governor's Special Message. |
| 24-44 | May 3 | OFFICERS. | Compensation of State Service Officer may not be increased during present term to \$3600.00 as provided by House Bill No. 28, 62nd General Assembly. |
| 24-44 | May 10 | STATE BUILDING COMMISSION. | Circumstances under which contracts may be let on a fee basis. |
| 24-44 | May 18 | Hon. Forrest C. Donnell | WITHDRAWN |
| 24-44 | May 19 | DEFICIENCY APPROPRIATIONS. | Invalid when passed by satisfy claims arising out of a contract or agreement made in violation of the State Budget Act. |
| 24-44 | June 15 | GEOLOGIST. | May employ assistants on monthly salary basis, if salary is not in excess of daily maximum. |
| 24-44 | June 21 | APPROPRIATIONS. | Section 6, H. B. 657, Laws of 1943, page 278, in providing funds for relief of sheriffs who incurred expense without Governor's warrant is invalid. |
| 24-44 | Sept 8 | CRIMINAL LAW. | Manner of executing death sentence on convict restored to sanity after sentence to death by hanging. |
| 24-44 | Dec 8 | GOVERNOR. | Inspection of bonds enumerated in Section 13086 R.S. Mo. 1939 – Power of State Officers to delegate duty of inspection. |
| 25-44 | June 27 | ASSESSORS. | May appoint deputy to be paid out of the fees allowed to such assessor. |
| 26-44 | Jan 27 | COURT JUDGES. | 1) Associate Judge must be a resident of district in order to qualify; voluntary departure from district works a forfeiture of office. 2) Sections 2475 and 1988, R.S.Mo. 1939 construed. |
| 26-44 | Aug 15 | SCHOOLS. | Board of Regents of State Teachers College may lease facilities of college for joint use with Army Hospital. |
| 26-44 | Oct 6 | ELECTIONS. | In St. Louis City no registration number is required to be placed on ballots; all numbers on ballot must be covered by sticker. |
| 27-44 | May 4 | RECORDER. | Grantees should be named in index in the manner their names appear in deed. |
| 27-44 | July 17 | INSURANCE. | Approval of Amendment to Articles of Incorporation of Physicians Life and Casualty Company, of Springfield, Missouri. |
| 27-44 | Aug 23 | INSURANCE. | Approval of Minutes of special meetings of directors and stockholder of the Commonwealth Life and Accident Insurance Company of St. |

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| | | | Louis, Missouri. |
| 27-44 | Dec 19 | INSURANCE. | Approval of Amendment of Articles of Incorporation of Commonwealth Life and Accident Insurance Company of St. Louis, a corporation of Missouri. |
| 27-44 | Dec 27 | INSURANCE. | Approval of Declaration of Intention to Form Corporation – St. Louis Casualty and Surety Company. |
| 28-44 | Jan 10 | COUNTY CLERK. | Not the duty of county clerk to make up Delinquent Personal Tax Books; County Clerk not required to make two complete sets of current personal and current real estate Tax Books. |
| 28-44 | Aug 22 | ELECTION CONTESTS. | Will not lie in elections to determine municipal form of government. |
| 28-44 | Nov 30 | TAXATION. | Surplus from tax sale should be paid to person entitled thereto. In case of redemption, interest should be charged on the purchase price, costs and subsequent taxes paid by purchaser. |
| 28-44 | Dec 13 | PURCHASING AGENT. | Section 56 of House Bill 408, Laws of Missouri, 1943, page 164, does not apply to the purchase of automobiles for state elective officials. |
| 29-44 | Jan 31 | SCHOOLS AND SCHOOL DISTRICTS. | School property does not revert by reason of the temporary non-use of the school premises. |
| 29-44 | Feb 14 | SCHOOL FUND LOANS. | (1) County court must require personal security for all school loans whether made prior to or after passage of 1943 laws. (2) Borrowers must comply with provisions of Sec. 10386, Laws of Mo., 1943, p. 883, whether the loan was made prior to or after the passage of this section. |
| 31-44 | Jan 26 | ELECTIONS. | Absentee votes to be counted by four disinterested persons appointed by the county clerk and either two justices of the peace or two members of the county court. |
| 31-44 | Feb 19 | PROBATE JUDGE. | May obtain a reasonable allotment to care for necessary stenographic services provided he has complied with the provisions of the County Budget Law and the county has budgeted such allotment. |
| 32-44 | Jan 12 | PROSECUTING ATTORNEY. ASSISTANT PROSECUTING ATTORNEY. | Appointment; liabilities. |
| 32-44 | Mar 29 | DEPARTMENT OF AGRICULTURE. COMMUNITY SALES. | Section 2, Paragraph D., Laws of Missouri, 1943, Page 311 construed. |
| 32-44 | June | PROSECUTING | Payment of statutory fees by warrant or voucher should be made to |

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| | 12 | ATTORNEYS. | prosecuting attorney and, in his absence, endorsed by assistant. |
| 32-44 | Sept 1 | INSURANCE. | Persons who are insurance brokers. |
| 33-44 | Mar 3 | MOTOR VEHICLES. | Decision of Commissioner as to type of motor vehicle, classification, computation of fees, final and conclusive on all licenses issued pursuant to Section 8369, Laws of Missouri, 1943, Page 663 to 666 inclusive. |
| 33-44 | Apr 10 | COUNTY COLLECTOR. SCHOOL FUNDS. | Forfeited commissions and penalty adjudged against Collector for failure to timely account for tax collections goes into county public school fund. |
| 34-44 | Jan 20 | SCHOOLS. | House Bill 227, Laws of Missouri, 1941, authorizes a common school district adjacent to a consolidated district to become consolidated with such consolidated district in a certain manner. |
| 34-44 | Apr 5 | CRIMINAL LAW. | Admissibility of evidence of prior offenses and of charges under different statutes. Election of county in information. |
| 34-44 | Sept 23 | GENERAL ELECTION. | Where political party fails to nominate a person for County Surveyor, County Clerk shall provide proper space on the ballot for voters to write in name of person they desire to be elected for such office. |
| 35-44 | Mar 24 | SCHOOLS. | Filling of vacancy in office of School Director of Consolidated School District at annual meeting, a void act, where notice under Section 10418, R. S. Mo., was not given beforehand. |
| 35-44 | July 7 | CITIES. | Words "previous year" in Sec. 6976, R. S. Mo., 1939, refer to previous year in which city actually levied a tax. |
| 35-44 | Sept 11 | MUNICIPAL CORPORATIONS. | Cities of the 4th class may acquire easement in street for storm sewer, and may maintain same after street is vacated for travel. |
| 35-44 | Oct 10 | CITY AND AIRPORTS. | West Plains may lease an airport under Section 15122, Revised Statutes 1939. |
| 37-44 | Jan 19 | COUNTY COURTS REGISTRARS. | County Court should not pay for supplies for the Registrar of Vital Statistics. |
| 37-44 | Feb 8 | HABITUAL CRIMINAL ACT. | For prosecution under Habitual Criminal Act it is only required that previous crime be punishable by imprisonment in the penitentiary. |
| 37-44 | Oct 21 | TAXATION. | Deed under Jones-Munger law conveys fee simple title, subject only to certain taxes. |
| 37-44 | Nov 24 | PROSECUTING ATTORNEYS. | Under Sections 4876 and 4878 R. S. Mo. 1939, must investigate as well as prosecute violators of liquor control act. A sound discretion must be used to determine extent of investigation. |
| 38-44 | May 10 | CONVEYANCE. | Maker of a note secured by a deed of trust cannot release record after |

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| | | | payment of such note. |
| 38-44 | May 20 | MISSOURI STATE SCHOOL. | Accepting patients. |
| 41-44 | Jan 20 | SCHOOL DISTRICTS. | May sell school buildings if no longer required and new building is provided. |
| 41-44 | Jan 24 | TAXATION. TAX SALES. | Form of Trustee's Deed. |
| 41-44 | Mar 17 | COUNTY BUDGET ACT. COUNTY COURT. | County court cannot rebudget or amend budget after final approval and certification. |
| 41-44 | June 14 | REAL ESTATE COMMISSION. APPLICATION FOR RENEWAL LICENSE. | Commission does not have power to request a certificate from applicant as to sales made between date of expiration of former license and renewal application. |
| 41-44 | June 30 | OFFICERS. MILITARY SERVICE. | Whether enlistment in United States Maritime services creates a vacancy, is a matter for judicial interpretation. |
| 41-44 | Oct 11 | MISSOURI REAL ESTATE COMMISSION. REVOCATION OF LICENSE. | The date of a conviction fixes the jurisdiction of the Commission in revocation of license. Using the mails to defraud in connection with S.E.C. regulations comes within the provisions of Section 14 of the Missouri Real Estate Act relative to revocation of licenses. |
| 42-44 | June 15 | DEPUTY RECORDER. | Compensation of Deputy Recorder must be paid from fees earned by the office of Recorder of Deeds. |
| 43-44 | June 5 | VITAL STATISTICS. | Local Registrars in cities 10,000 to 30,000 must supply city Board of Registrars monthly list of deaths of persons over 21 years of age, during preceding month. |
| 43-44 | July 28 | SHERIFFS. | Not authorized to make a charge for attendance on the juvenile court and another charge for attendance on the circuit court on the same day, in the same circuit. |
| 44-44 | May 29 | MISSOURI SCHOOL FOR DEAF. | Board of Managers must first obtain authority through an appropriate act of General Assembly before a building may be razed. |
| 46-44 | Jan 11 | CONFEDERATE HOME. | Five questions relative to the transfer of the management of the Confederate Home from the Board of Trustees of such home to the Board of Managers of the State Eleemosynary Institutions. |
| 46-44 | Jan 20 | MARRIAGE. | Eleemosynary Institution laboratories are not approved by the State Board of Health to permit them to make blood tests under section 3364A. |
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| 46-44 | Feb 8 | TREASURER. COUNTY COURT. | Treasurer may be reimbursed for necessary clerical hire. |
| 46-44 | Feb 9 | ELEEMOSYNARY INSTITUTIONS. | Leases on a crop-rent basis may be made for a period in excess of two years. |
| 46-44 | Apr 19 | ASSESSORS. | Not entitled to compensation for assessing non-taxable property. |
| 46-44 | June 13 | COUNTY COURT. | School fund mortgages. Rate of interest. Reduction of interest before termination of contract. |
| 48-44 | Aug 18 | TOWNSHIP COLLECTORS. OFFICERS. | Township collector may appoint deputy to perform ministerial duties, "Abandonment" of office is question of fact, failure to personally perform duties must be decided by ouster suit. |
| 48-44 | Aug 31 | TOWNSHIPS. | Debts in excess of anticipated revenue are invalid. |
| 48-44 | Sept 20 | Hon. H. A. Kelso | WITHDRAWN |
| 48-44 | Nov 22 | GAMING. | Bingo is prohibited even if proceeds go to charity lottery. |
| 49-44 | Feb 3 | COUNTY COURT. BONDED INDEBTEDNESS. TAXATION. | County Court cannot divert to the County Revenue Fund money collected to pay off bonded indebtedness. |
| 49-44 | May 15 | Marriage licenses. | Duty of recorder of deeds to record returns of marriage licenses. |
| 51-44 | Feb 11 | NURSES' EXAMINATION. | Statute does not require citizenship. |
| 56-44 | July 26 | CORPORATIONS. | Attorney for stockholder who is not an officer of the corporation cannot file affidavit for registration. |
| 57-44 | Jan 20 | LIQUOR LICENSE. | County Court is not authorized to return license fee paid into county treasury after vacation of premises or abandonment of business by licensee. |
| 57-44 | Feb 5 | PROBATE JUDGE. | Cannot secure additional compensation for performing duties of office where there is no special statute authorizing it. |
| 57-44 | Feb 11 | RECORDER OF DEEDS. | Conservator duly appointed by Federal Home Loan Bank Board upon liquidation of Federal Savings and Loan Association would have authority to release deeds of trust and the Supervisor of Building and Loan Associations of Missouri has no control over the situation. |
| 57-44 | Mar 6 | COUNTY COURT. | Under Sec. 11118, R. S. Mo. 1939, until taxes on real estate have been paid and collected, whether delinquent or otherwise, county court has authority to correct errors in valuations, assessment and levy, and may order such levy changed to conform to the requirements of the law. |
| 57-44 | Apr 3 | Miss Helen | WITHDRAWN |

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| | | Masterson | |
| 57-44 | Apr 10 | COUNTY COURTS. | No statutory authority to sell, discount or assign notes or bonds. |
| 57-44 | July 14 | CHILDREN. | “Neglected Child” question of fact. Would not include child suffering from cruelty of parents in counties of less than 50,000. |
| 57-44 | Aug 9 | SCHOOLS. | Where default occurs on loan of surplus school funds made under sections 10434 and 10435, R. S. Mo., 1939, County Court makes order of foreclosure as is provided by Sec. 10387 R. S. Mo. 1939. |
| 57-44 | Sept 21 | RECORDER OF DEEDS. | A fee may not be charged by a Recorder of Deeds for recording a discharge of a soldier in military service. |
| 57-44 | Nov 18 | ABSENTEE BALLOT. | Absentee ballot of person who expects to be absent from his county, but within the State on election day, should be counted although voter happens to be out of State all or a portion of election day. |
| 58-44 | May 24 | ELECTIONS. | Absence from State on military service is not itself a change of residence as would bar candidacy for public office. |
| 59-44 | Feb 3 | PROBATE JUDGE. | May resign office. |
| 60-44 | May 10 | ELECTION. | Section 11550, as enacted by the 62nd General Assembly, Extra Session, 1944, and Section 11551, Revised Statutes of Missouri 1939, construed. |
| 62-44 | June 28 | COUNTY TREASURER. OFFICERS. | Field Representatives of State Service Officer not public officers. Nor do statutes preclude holding office of field representative and County Treasurer at same time. Offices are not incompatible. |
| 62-44 | Aug 24 | MOTOR VEHICLES. | Farmers operating motor vehicles within this state carrying their own farm products must display their name and address and weight of the vehicle. Also display the word ““Local”” on said motor vehicle. |
| 62-44 | Sept 15 | ASSESSMENTS. | State Tax Commission cannot review assessments made by city assessing authorities. |
| 62-44 | Nov 29 | TAXATION. | Three Story Masonic Lodge building having two stories rented commercially is not exempt from taxation. |
| 64-44 | Sept 21 | ROADS AND BRIDGES. | Sec. 8668, R. S. Mo. 1939, is not applicable to counties having a population of 20,000 and not more than 50,000 inhabitants. |
| 66-44 | Jan 15 | COUNTY COURT. | The county court has jurisdiction to correct taxes extended against exempt property, but no authority to change taxes extended before the property became exempt. |
| 66-44 | Jan 20 | COUNTY COURT. | County Clerk cannot designate a judge to be presiding judge under Section 2493, R. S. 1939, when the duly elected presiding judge is present. |
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| 66-44 | Mar 28 | COUNTY JUDGE – COMPENSATION. | Single county judge who appears, to act as member of court at times provided by law, is entitled to compensation. |
| 66-44 | July 14 | FEES – PROBATED JUDGES. | Probate Judges are entitled to fees for certifying to assessors lists of administrators and may retain same if it is in excess of salary. |
| 66-44 | July 28 | RECORDERS - DUTIES AS TO CHATTEL MORTGAGES. | It is not necessary that a certificate of title be presented at the time a chattel mortgage on an automobile is recorded. |
| 67-44 | Jan 20 | RECORDER OF DEEDS. | As a compensation for making and preserving direct and inverted indexes only a fee of ten cents shall be collected for each instrument affecting real estate recorded. |
| 67-44 | July 10 | FEES – CONSTABLES. | Constables shall collect fees as provided under Section 13399, Laws of Missouri, 1943, for serving process in criminal cases. |
| 68-44 | Jan 24 | MISSOURI LIBRARY COMMISSION TRUST. | The Missouri Library Commission may receive gifts of money, books or other property, which may be used or held in trust for the purposes given by the person creating said trust. |
| 69-44 | Jan 31 | Miss Hazel Palmer | WITHDRAWN |
| 70-44 | Oct 11 | COUNTIES. | Abolition of township organization creates vacancy in office of county collector, which is filled by the Governor. |
| 71-44 | Jan 5 | PROBATE JUDGE. | Probate Judges of counties now having, or which shall hereafter have less than 19,000 population, shall charge the fee, authorized by statute, for each official act performed by him as such officer. He shall at the end of each month, make and file a report with the County Clerk. 1. Of all fees earned and collected. 2. All fees earned by not collected. The fees collected for (a) Solemnization of marriages and (b) Hearing and determining inheritance tax matters may be retained by the Probate Judge and no accounting is required. |
| 71-44 | Feb 25 | PROBATE JUDGES’ FEES. | Do not have to account for acknowledgments and affidavits where probate seal is used, if fees therefor not chargeable against estate pending in his court. |
| 72-44 | Jan 28 | CONSTITUTION. | Section 14, Article X, Constitution of Missouri, should not be withdrawn. |
| 72-44 | Feb 4 | SHERIFFS. MORTGAGES. | Deputy sheriff may foreclose mortgages in the absence of the regular sheriff. |
| 72-44 | Feb 18 | Hon. C. H. Plye | WITHDRAWN |
| 73-44 | Apr 17 | JUSTICES OF THE PEACE. OFFICERS. | Wife of justice of the peace may not perform his duties of office during his absence as a member of the Armed Forces. |
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| 73-44 | June 13 | CITIES. | Cities of the third class not subject to taxation on airport owned in another county. May reasonably extend limits to include adjacent territory. Reasonableness largely question of fact. |
| 73-44 | Sept 8 | SCHOOLS. | School District sending pupils to another district may not claim credit on tuition for taxes paid by residents of its districts to receiving district. |
| 74-44 | Jan 3 | Mrs. Ada Reynolds | WITHDRAWN |
| 75-44 | Oct 27 | Mr. George A. Riley | WITHDRAWN |
| 76-44 | Jan 11 | COUNTY SURVEYORS. | Who are ex officio highway engineers must pay registration fee as provided by C. S. S. B. 61, Laws of Mo. 1941. |
| 76-44 | Jan 13 | COUNTY DEPUTY CIRCUIT CLERK. SALARY. | Circuit Judge, or Judges, may increase the compensation of deputy circuit clerk. |
| 76-44 | Nov 16 | TAXATION. | Associations organized under Article 23, Chapter 102, R. S. Mo. 1939, are not exempt from merchant's tax. |
| 77-44 | Mar 15 | MISSOURI REAL ESTATE ACT. CONVICTION. PARDON. | A pardon does not permit the Missouri Real Estate Commission to issue a broker's or salesman's license to one who has been convicted of offenses designated in Section 14 of the Missouri Real Estate Act. |
| 78-44 | Apr 19 | Hon. Roy Scantlin | WITHDRAWN |
| 78-44 | June 17 | SCHOOLS. | State Superintendent may revoke state teacher's certificate for any grounds mentioned in Sec. 10631, R. S. Mo. 1939, and he is not confined to grounds specified in Sec. 10599, R. S. Mo., 1939. |
| 78-44 | Aug 24 | CITIES OF THE THIRD CLASS. | 800 foot street improvement shall be done under Section 6989, R. S. Mo. 1939; owners of church property have right to file remonstrances. |
| 79-44 | Jan 19 | Hon. Theo. R. Schneider | WITHDRAWN |
| 79-44 | Feb 7 | INSURANCE. | Approval of papers as to form and sufficiency submitted in connection with change of Articles of Incorporation of American Automobile Insurance Company. |
| 79-44 | Feb 7 | INSURANCE. | Approval of papers as to form and sufficiency submitted in connection with change of Articles of Incorporation of Equity Fire Insurance Company. |
| 79-44 | Mar 17 | INSURANCE. | Approval of papers as to form and sufficiency submitted in connection with change of Articles of the Central Mutual Casualty Company of Kansas City, Missouri, organized under Article 7, Chapter 37, R. S. Mo. 1939. |
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| 79-44 | Mar 31 | INSURANCE DEPARTMENT. IMPOUNDED FUNDS. | Insurance Companies may take credit in their 1943 tax return under Sections 6094, 6095, R. S. Mo. 1939, for impoundings ordered returned to policyholders. |
| 79-44 | May 3 | INSURANCE. | Approval of proceedings at meeting of stockholders and directors of St. Louis Fire and Marine Insurance Company, increasing capital stock and number of directors and reducing par value of common stock. |
| 79-44 | May 5 | INSURANCE. | Approval of proceedings at the meeting of stockholders of Central Surety and Insurance Corporation, amending Article 3 and repealing Article 6 of the Articles of Incorporation. |
| 79-44 | May 5 | INSURANCE. | Approval of proceedings at meeting of stockholders of Central Surety Fire Corporation, amending Article 3 and repealing Article 6 of the Articles of Incorporation. |
| 79-44 | May 9 | INSURANCE. | Approval of Amendment to Articles of Incorporation of Utilities Insurance Company, St. Louis, Mo. |
| 79-44 | June 3 | LIQUOR. | County must pro rate license tax for period less than full license year as State is required to do under Sec. 4897, R. S. Mo., 1939. |
| 79-44 | Aug 22 | INSURANCE. | Approval of Amendment to Articles of Association of Old American Insurance Company, a corporation, of Jackson County, Missouri. |
| 79-44 | Nov 21 | SCHOOLS. MISSOURI SCHOOL FOR THE DEAF. | Pupil cannot be excluded because he refuses to submit to medical treatment but can be excluded temporarily to prevent spread of contagious diseases. |
| 79-44 | Nov 21 | INSURANCE. | Approval of Amendment to Articles of Association of Reserve Mutual Fire Insurance Company, a corporation, of Missouri. |
| 79-44 | Nov 21 | INSURANCE. | Approval of Amendment to Articles of Association of Reserve Mutual Casualty Company, a corporation of Missouri. |
| 80-44 | Sept 7 | LINCOLN UNIVERSITY. | Curators of Lincoln University may not lawfully pay the tuition for negro students at St. Louis University in Missouri under the terms of Section 10779, R. S. Mo. 1939. |
| 81-44 | Jan 6 | TAXATION. | Distribution of surplus from general tax sale after payment of taxes, penalties, interest and costs. |
| 81-44 | Feb 24 | RECORDER OF DEEDS. BILLS OF SALE. | A Recorder may refuse to record a proported Bill of Sale unless it is acknowledged in compliance with Section 3416, R. S. Mo. and if attempted to be recorded by proof, then Sections 3418, 3419 and 3420, R. S. Mo. 1939, must be complied with. |
| 81-44 | May 2 | COUNTY COURT. SHERIFF. | The Sheriff of Lawrence County not entitled to receive any of the official salary budgeted by the County Court for compensation of a jailer appointed by Sheriff and later discharged by him. Sheriff's |

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| | | | compensation not increased or diminished during the term of office for which he was elected. |
| 82-44 | Jan 19 | SCHOOL DIRECTOR. | Induction of School Director into Armed Forces does not affect his tenure of office. |
| 82-44 | Mar 7 | SCHOOLS. | Sending district where pupil resides must pay non-resident tuition under section 10458, R. S. Missouri, 1939. "Residence" is determined by facts in each particular case. |
| 82-44 | Mar 10 | COUNTY COURTS. | County Courts may purchase real estate improved or unimproved as an addition and enlargement of court house facilities; payment subject to the county budget law and section 13118. R. S. Missouri, 1939. |
| 82-44 | Apr 15 | SCHOOLS. | Under Section 10410 R. S. Mo., 1939, Board of Arbitration passing on change of boundaries between two districts NOT authorized to allow change of one district is left with less than twenty persons of school age, or if territory to be added to other district does not contain persons of school age. |
| 83-44 | Jan 11 | PURCHASING AGENT. | Cannot prescribe manner or payment of rental accounts; nor is certification required under Sec. 14592, Laws 1943, p. 1005, on rental accounts. |
| 83-44 | Feb 8 | RECORDER OF DEEDS. | 1) When a paper writing purporting to be a last will & testament may be refused for recording. 2) Four questions dealing with the releasing and cancelling of notes and releasing of deed of trust securing same of record in the recorder's office. 3) a) Three day waiting period for issuing marriage license may be dispensed with on order of circuit or probate court or judge thereof in vacation giving authority to recorder. 3) b) Applicant who is pregnant may dispense with certificate of serological test for syphilis by presenting certificate of licensed physician so stating, to the recorder. |
| 83-44 | Feb 25 | PROBATE JUDGES' FEES. | Maximum retention of fees permissible for 1941 and 1942. |
| 83-44 | Apr 21 | ROADS AND BRIDGES. | The word "shall", as used in Section 8514, R. S. Missouri, 1939, is to be construed in a directive or permissive sense; that the words "biennially thereafter", as contained in said section, are to be construed as at least two years must elapse before a County Court shall have authority to change the boundaries of a road district formerly created under said section. |
| 83-44 | June 21 | FUND COMMISSION. ESCHEAT. BOARD OF EDUCATION. | May not invest escheated funds in government bonds until escheat becomes absolute and money is paid into public school fund and then it is duty of board of education to direct such investment. |
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| 83-44 | Oct 10 | POOL, BILLIARD AND OTHER TABLES. | Construction of certain sections contain in Chapter 135, with reference to issuing license. |
| 83-44 | Oct 27 | SCHOOLS. | Money received by consolidated district from consolidation of school house must be paid into "Building Fund." |
| 83-44 | Nov 30 | TAXATION. | County collector in counties of 200,000 to 700,000 population not entitled to fees allowed by Section 11117, but county clerk is entitled to fees allowed him by said section. |
| 84-44 | May 15 | ELECTIONS. | Inductees not yet sworn in cannot vote an official war ballot. |
| 85-44 | Feb 1 | COUNTY COURT. ROAD DISTRICTS. | County court may change the boundaries of road districts and may organize only one such district for the whole county. |
| 85-44 | June 13 | STATE BOARD OF HEALTH. MERIT SYSTEM. | Sec. 71, Laws of Mo., 1943, p. 256, gives authority to State Board of Health to establish and operate under a merit system of personnel administration. |
| 86-44 | May 22 | ELECTION LAWS. | Section 11539, Laws Mo. 1941, p. 355 and Section 11539, Laws Mo. 1941, p. 365, when considered together are not in conflict. |
| 86-44 | May 22 | TRADE MARKS. REGISTRATION OF VESSELS. | Section 15472, R. S. 1939, pertains only to the registration of name of owner. Statute does not provide for registration of "bottle cases." Application may be made for only one owner at a time. |
| 86-44 | July 13 | CONSTITUTIONAL AMENDMENT. | Title for proposition to permit Legislature to control school fund. |
| 86-44 | Aug 10 | BONDS. | Disapproved for failure to comply with language of the statute. |
| 86-44 | Aug 15 | CONSTITUTIONAL AMENDMENT. ELECTIONS. | Title for proposition to create unicameral legislature. |
| 86-44 | Aug 25 | ELECTIONS. | Mandatory for Secretary of State to prescribe weight and size of ballot for absentee soldier voting. |
| 86-44 | Nov 17 | PROSECUTING ATTORNEY. | Commission to Prosecuting Attorneys elected to new terms, beginning January 1, 1945, may issue now. |
| 87-44 | Jan 11 | SOLDIERS. STATE BOARD OF HEALTH. | Soldiers, sailors and marines in service or honorably discharged from service, or dependents of any soldier, sailor or marine shall not be charged for certified copies of public records in the care and custody and control of the State Board of Health, where such copy is to be used to establish a claim with the United States government. |
| 89-44 | Mar 11 | INHERITANCE TAX. | Procedure. |
| 89-44 | Mar 27 | TAXATION AND REVENUE. | Township road and bridge fund may not be expended in improving streets in cities of the fourth class except for improving portions of |

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| | | | such city streets which form connecting links in a system of public roads of the county. |
| 89-44 | May 16 | SPECIAL ROAD DISTRICTS. | May be formed within limits of incorporated township and include area of city of fourth class. |
| 89-44 | Aug 14 | SPECIAL ROAD AND BRIDGE FUND. | Authority of township directors, under township organization, to use special road and bridge fund in improving or repairing any street in a city within said township. |
| 89-44 | Nov 27 | ROADS. COUNTY COURT. | Damages occasioned by relocation may not be paid by county unless road established and damages ascertained as provided by law. |
| 90-44 | May 29 | LABOR. | Sec. 10175 authorizing 5 days' pay to be withheld by employer from employees' wages, does not control the disposition of the sums withheld. |
| 90-44 | July 13 | LABOR. DAY. WOMEN. | The word "day" as used in Section 7815, Laws of 1913, includes the 24-hour period from the time employee starts to work. |
| 90-44 | Sept 1 | CHILD LABOR LAW. EMPLOYMENT OF CHILDREN. | Private hospitals employing children under 16 years of age are commercial enterprises, and within the child labor laws respecting certificates of age, type of work, maximum hours, and minimum age, etc. |
| 93-44 | Feb 7 | ELEEMOSYNARY INSTITUTIONS. | How patient may be admitted to the school at Marshall—method of determining whether such person shall be sent as a County patient. |
| 93-44 | Aug 24 | OFFICE OF PROBATE JUDGE. VACANCY. ELECTIONS. | Nomination of candidate where vacancy occurs in the office by death of the incumbent after primary election. |
| 95-44 | Mar 1 | JUSTICES OF THE PEACE. DURATION OF OFFICE. | On failure of successful candidate for office of Justice of the Peace to secure his commission and take oath of office in qualifying himself to hold office, the then present incumbent of such office continues to hold the office until his successor is elected and qualified. |
| 96-44 | Apr 19 | INCOME TAX. | Salary of men in service subject to state income tax. |
| 97-44 | Jan 6 | COUNTY COURT. | The County Court has the authority to sell or trade the county jail. |
| 97-44 | Jan 24 | SCHOOLS. | (1) Directors of school district cannot donate to the American Red Cross from funds of the "incidental fund"; (2) Directors of such school district cannot invest surplus funds in the "incidental fund" in United States bonds. |
| 97-44 | Jan 25 | ACCOUNTANCY, STATE BOARD OF. | Required to maintain an office in Jefferson City, Missouri, as provided by Section 14906 of the Laws of Missouri for 1943. |
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| 97-44 | Feb 4 | COUNTY COURT BUDGET. | Class 5 of Section 10914, Laws of Missouri, 1941, page 652, construed. |
| 97-44 | June 12 | COUNTY CLERKS. BALLOTS. ELECTIONS. | Unnecessary for County Clerk to advertise for bids for printing of ballots for election. |
| 99-44 | Jan 4 | COUNTY COURTS. | May charge County Agent office rent for rooms used by him in County Courthouse. |
| 99-44 | Jan 13 | ROADS AND BRIDGES. | Road district levy under Section 8619 and Sec. 23, Art. 10, Mo. Const. cannot be made by county court until authorized by majority vote of road district. |
| 99-44 | May 12 | ELECTION. | Section 11550, as enacted by 62nd General Assembly, Extra Session, 1944, and Section 11551, Revised Statutes of Missouri 1939, construed. |

PENAL INSTITUTIONS--OUT-
STANDING DUPLICATE DRAFT:

Statute provides no way to clear
records on outstanding duplicate
draft.

January 11, 1944

FILED

3

1-27

Mr. K. Autenrieth
Credit and Office Manager
Jefferson City, Mo.

Dear Sir:

We have for answer your request for an official opinion
dated December 28, 1943, which is as follows:

"On January 8, 1943, State Treasurers Check
No. 547352, \$3,676.17, was issued to J.
Greenebaum Tanning Company, Chicago, Illi-
nois, paying invoice of 11-9-42, \$84.38 and
11-30-42, \$3,666.82, less discount of \$75.03.
Also on January 14, 1943, State Treasurer
Check #55203, for \$3,593.48, was issued pay-
ing invoice of 11-30-42, \$3,666.82, less dis-
count of \$73.34. This was a duplicate pay-
ment of one of the invoices covered by State
Treasurers check #547352 of January 8, 1943.

"As soon as the error was discovered the State
Treasurer was notified to stop payment and
Greenebaum Tanning Company was notified to
return the check as soon as received. They
advised immediately that Check #55203 had
not been received and up to the present has
not shown up.

"Our records show that payment has been made
from our funds and the State Treasurers re-
cords show the Check #55203 as outstanding.
They state they have no authority to issue
cancellation on this check and we know of
no way to clear our records unless they give
us that authority.

"We would like to have your opinion."

We understand from the above request that the question
is "How can the Commissioner of Industries clear his records
as to the outstanding check No. 55203?"

For the purpose of this opinion we will assume that the second check issued by the State Treasurer was issued in conformity to the statutory provisions and State Constitution. The pertinent sections in regard thereto are as follows, Section 13042, R. S. Mo., 1939, provides in part as follows:

"In all cases of accounts audited and allowed against the state, and in all cases of grants, salaries, pay and expenses allowed by law, the auditor shall draw a warrant on the treasurer for the amount due.* * *"

Section 13047, R. S. Mo., 1939, provides in part as follows:

"The state treasurer shall receive and keep, as provided by law, all the moneys of the state not expressly required by law to be received and kept by some other person; disburse the public moneys upon warrants drawn on the treasury according to law, and within the time limited in the Constitution, and not otherwise; keep a just and true account of the funds and the appropriations made therefrom by law, and the disbursements made thereunder.* * *"

Section 13054, R. S. Mo., 1939, is as follows:

"Whenever a warrant shall be presented to the treasurer it shall be his duty to pay the same in lawful money, or by giving a check on some depository of state funds, attesting the same by affixing his seal of office to said check: Provided, said warrant is properly drawn against a legal appropriation, and does not exceed the amount thereof; and no money shall be drawn from a depository of state funds in any other manner. (R.S. 1929, Sect. 11429.)"

Article 10, Section 15, Constitution of Missouri, is as follows:

"All moneys now, or at any time hereafter, in the State Treasury belonging to the State, shall, immediately on receipt thereof, be deposited by the Treasurer to the credit of the State for the benefit of the funds to which they respectively belong, in such bank or banks as he may, from time to time, with the approval of the Governor and Attorney-General select, the said bank or banks giving security satisfactory to the Governor and Attorney-General, for the safe-keeping and payment of such deposit, when demanded by the State Treasurer on his checks--such bank to pay a bonus for the use of such deposits not less than the bonus paid by other banks for similar deposits; and the same, together with such interest and profits as may accrue thereon, shall be disbursed by said Treasurer for the purposes of the State, according to law, upon warrants drawn by the State Auditor, and not otherwise."

It can be seen from the above that the Auditor's warrant is the basis for paying state claims from the State Treasury. Section 10907, R. S. Mo., 1939, provides in part as follows:

"The auditor shall keep accounts showing the appropriations and allotments. Such accounts shall show all charges and obligations incurred against such appropriations and allotments.* * *"

"* * * The auditor shall be liable personally and on his bond for any certification in excess of any allotment or in excess of the cash balance available.* * *"

Mr. K. Autenrieth

-4-

Jan. 11, 1944

C O N C L U S I O N

In the light of the above it is the opinion of this office that when a warrant is issued by the Auditor, and a check issued by the Treasurer on the basis of such warrant, the outstanding check must remain as a charge against the appropriation, until the close of the biennium. There is no authority for the Treasurer or Auditor to write off the additional check, until it is produced. Therefore, the appropriation has to stand charged with both warrants.

Respectfully submitted,

GAYLORD WILKINS
Assistant Attorney General

GW:DC

APPROVED:

ROY MCKITTRICK
Attorney General

STATE TREASURER--AUTHORITY AS
TO OUTSTANDING CHECKS.

Where State Treasurer
issued a check as provided
by statutes and the same
is lost, he may require
bond before issuing dupli-
cate check--Commissioners
of the Department of Penal
Institution shall have power
to execute such bond.

January 12, 1944

1-18
FILED
3

Mr. K. Autenrieth
Credit and Office Manager
Commissioner of Industries
Jefferson City, Mo.

Dear Sir:

We have your request of December 28, 1943, which
is as follows:

"On May 22, 1943, the State Treasurer
issued check #631288, \$246.00, to the
Parker Boot & Shoe Mfg. Company (State
Owned).

"This was in payment of invoice issued
to State Hospital #2 at St. Joseph,
Missouri. The check was never received
by the Department of Penal Institutions
and the State Treasurer has advised that
before a duplicate check can be issued
it will be necessary that a Bond be exe-
cuted for double the amount of the check,
or, \$492.00.

"Payment was ordered stopped on the out-
standing check and of course if it shows
up payment will be withheld.

"What we would like to know is...who is
authorized to sign bond, or, if it is
necessary for Bond to be issued, as this
is a transaction of one state institu-
tion to another."

For the purpose of this opinion, we shall answer
your two questions in reverse order. The first ques-
tion is whether or not it is necessary for a bond to
be executed in this instance, inasmuch as "this is
a transaction of one state institution to another."
Section 13012 R. S. Mo. 1939, provides that the
Treasurer shall provide a bond, in the following lan-
guage:

"Immediately after his election or appointment, the state treasurer shall execute and deliver to the governor a bond to the state in the sum of five hundred thousand dollars, with not less than ten sureties, to be approved by the governor, conditioned for the faithful performance of all the duties required or which may be required of him by law, whether as state treasurer, or in any capacity in which he may be required to act ex officio by virtue of being state treasurer, and for the safety of the state funds and securities in his custody or under his control; which bond shall be renewed every two years, and as much oftener as the governor may require and the safety of the public moneys and securities demand.* * *

Among the duties incumbent upon the Treasurer to perform, by the statutes is included, Section 13054, R. S. Mo. 1939, which reads as follows:

"Whenever a warrant shall be presented to the treasurer it shall be his duty to pay the same in lawful money, or by giving a check on some depository of state funds, attesting the same by affixing his seal of office to said check: Provided, said warrant is properly drawn against a legal appropriation, and does not exceed the amount thereof; and no money shall be drawn from a depository of state funds in any other manner. (R. S. 1929, Sec. 11429.)"

From the foregoing it is easily seen that it is the duty of the Treasurer to safely keep the moneys of the State, and to perform all duties of his office. No where in the statutes is there any provision for the State Treasurer to "cancel a check" once it has been duly issued, as provided by law, nor is there any provision for the State Treasurer to issue duplicate checks in the event a check is lost. It is true that Section 13079 R. S. Mo. 1939, which pertains to the Auditor, provides that in the event a warrant is lost, and is not paid by the State Treasurer, the person to whom the warrant is issued

may apply for a duplicate warrant, whereupon the Auditor may require a bond in double the amount of the warrant, and then issue a duplicate warrant. This section does not apply to the State Treasurer.

Therefore, it is apparent that this does not become a "transaction between two state institutions." The Treasurer, being under bond, to safely keep the moneys and faithfully perform the duties of his office, could issue a duplicate check, but if he did, he would do so at his own personal risk, under his bond, in the absence of any statutory authority to so do. Therefore, he could, if he desires to take the risk involved, have the right to demand whatever bond necessary to protect him from personal liability. It then becomes a transaction between an individual, i.e. the State Treasurer, and whoever applies for the duplicate check.

The second question is "who is authorized to sign bonds?" Section 8980 R. S. Mo. 1939, sets out the duties of the commissioners and makes them responsible for the efficient operation of the Penal Institutions.

Section 8985, R. S. Mo. 1939, in setting out the power of the commissioners, states in part as follows:

"* * * and shall be vested with and possessed of all other powers and duties necessary and proper to enable it to carry out fully and effectually all the purposes of this article.* * *"

From the foregoing it may be seen that if anyone has power to sign this bond, the Commissioners of the Department of Penal Institutions would be the proper party.

C O N C L U S I O N

It is therefore, the opinion of this office that the State Treasurer may issue a duplicate check at

Mr. K. Autenrieth

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Jan. 12, 1944

his own risk; and if he so desires, may require bond. It is our further opinion that if the Commissioner of Penal Institutions desires a duplicate check issued, and the Treasurer requires a bond, the Commissioner of Penal Institutions would be the proper party to sign the bond.

Respectfully submitted,

GAYLORD WILKINS
Assistant Attorney General

GW:DC

APPROVED:

ROY MCKITTERICK
Attorney-General

BONDS:

Penal Commissioners personally liable on bond to State Treasurer.

April 21, 1944

FILED

5.23
3

Mr. K. Autenrieth
Auditor
Department of Penal Institutions
Jefferson City, Missouri

Dear Mr. Autenrieth:

We have your request for an official opinion of March 8, 1944, which is as follows:

"On January 12th you rendered an opinion concerning the State Treasurer issuing a duplicate check to the Parker Boot & Shoe Mfg. Company, \$246.00.

"The question now arises as to whether or not the Commissioner signing the Bond is personally liable, or, is it the responsibility of the Department of Penal Institutions?

"Thanking you for giving this your attention, beg to remain"

The law has long been settled in this State, that a public officer or commission has no authority beyond that which is granted and authorized by statutes. A careful search of the statutes fails to disclose any authority for the Board of Penal Commissioners, as a board, to obligate the State upon a bond, such as is mentioned in the opinion request. Moreover, the bond necessarily would have to be for an indefinite period. Assuming that the Board did not have authority to bind the State it follows that it would not have the power to bind the successors.

In the case of State vs. Weatherby, 129 S.W. 2d 887, 344 Mo., 848, the Court said,

"* * * Public officials act in regard to public funds in a trust capacity. Their acts beyond the scope of their authority are, and are known to be, unauthorized, do not bind their principal, and their mistakes are their own and not the mistakes of the sovereign. * * *"

April 21, 1944

The Missouri Supreme Court in the very early cases of McClen-ticks vs. Bryant et al., 1 Mo., 598, laid down the rule which has never yet been changed. We quote,

"* * * The whole question then is thrown back on the nature of this instrument of writing sued on, whether it was lawfully given by public agents acting in pursuance of their authority. Public agents may bind themselves, if they think fit to do so, and do it by using apt words to that effect. They may bind themselves, if they make a contract beyond their authority. This court is unanimous on the point, that the defendants are liable, and on this plain ground, that the Commissioners had no power, as Commissioners, to bind the county, and that the county is not, nor can be by the Commissioners, bound to pay said debt. * * *"

C O N C L U S I O N

It is therefore, the opinion of this office, that if the Board of Penal Commissioners execute a bond to the State Treasurer of the State of Missouri, as outlined in the request, the members of the Board will be personally liable upon the bond, and further, that the said Board has no authority to bind the State in such a manner.

Respectfully submitted,

GAYLORD WILKINS
Assistant Attorney General

GW:DC

APPROVED:

ROY MCKITTRICK
Attorney General

PENAL INSTITUTIONS: Agricultural products produced by convict labor can be shipped to another state for use by that state.

October 6, 1944

FILE

3

10/6

Department of Penal Institutions
Jefferson City, Missouri

Attention: Mr. K. Autenrieth

Gentlemen:

We have your letter of the 3d in which you submit the following request for an opinion:

"Will you please advise me whether or not the Department of Penal Institutions, State of Missouri, is lawfully permitted to ship a carload of Green Beans to the Department of Public Welfare, State of Ohio?

"Also, if such shipment is permitted, is it necessary to mark each carton or container? There will be approximately 1600 cartons.

"We refer you to the Ashurst-Summers Act of 1940 (54 Stat. 1134), as amended, July 9, 1941, (55 Stat. 581), which became effective as of October 14, 1941. Also the Ashurst-Summers Act of 1935 (49 Stat. 494)."

In conversation with you over the telephone we were further advised that the beans proposed to be shipped are canned green beans.

The so-called Ashurst-Summers Act, referred to in your letter, now appears in 18 U.S.C.A. Section 396a, found at page 135 of said volume, reads as follows:

Department of Penal Institutions
Attention: Mr. K. Autenrieth

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Oct. 6, 1944

"Whoever shall knowingly transport or knowingly cause to be transported in interstate commerce, in any manner or by any means whatsoever, or aid or assist, knowingly, in obtaining transportation for or in transporting any goods, wares, and merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners (except convicts or prisoners on parole or probation) or in any penal or reformatory institution, from one State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, or from any foreign country, into any State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, shall be punished by a fine of not more than \$1,000 or by imprisonment of not more than one year, or both; Provided, that nothing herein shall apply to commodities manufactured in Federal or District of Columbia penal and correctional institutions for use by the Federal Government or the District of Columbia Government or to commodities manufactured in any State penal or correctional institution for use by any other State, or States, or political subdivisions thereof; to parts for the repair of farm machinery; or to agricultural commodities; Provided further, that this section shall go into effect one year after its approval by the President."

It will be seen by reading the above statute that in order for you to be allowed to ship the green beans to the Department of Public Welfare of the State of Ohio, they must first come within the proviso which exempts certain commodities from the operation of said act. They must be either "commodities manufactured in any State penal or correctional institution for

Oct. 6, 1944

use by any other State, or States, or political subdivisions thereof," or they must be "agricultural commodities." Our view is that they are not manufactured commodities. In *City of Memphis vs. St. Louis and S.F.R. Co.*, 183 Fed. 529, 538, will be found a collection of definitions by the various courts of what constitutes manufacturing and manufactured articles. The gist of all of said definitions is that "manufacture" implies the production of some new article by the application of skill and labor to raw materials. So long as the article upon which skill and labor has been applied remains the same article as it was before, then no manufacturing has been done. Numerous instances are pointed out in said decision of processing or other handling of articles which do not amount to manufacturing. For instance, the cutting of natural ice into pieces of a convenient size for handling and storing the pieces so cut in a building, has been held not to be manufacturing. Likewise, the roasting, mixing and grinding of coffee has been held not to be manufacturing. These and other examples were pointed out in the foregoing case, and upon authority of such definitions the court in that case held that the operation of a cotton press so as to compress, rebind and recover original bales of cotton so as to change the form, size and condition of the bales to make them more convenient for transportation, was not manufacturing. In view of the foregoing holdings we think that the canning of beans is not a manufacturing process and that the canned beans are not a manufactured commodity. After canning, they are still beans and have not been changed into any new article or product.

The next question to determine is whether green beans are an agricultural product. Of this we think there can be little doubt, since they are a direct product of the soil. A definition of the term, "agricultural commodities," is found in the case of *In re Rodgers*, 279 N. W. 800, 802, in the following language:

"The first question for our consideration is: What is meant by agricultural commodities?"

"In the case of *District of Columbia v. Oyster*, 4 Mackey 285, 15 D. C. 285, 54 Am. Rep. 275, in the body of the opinion the court said (page 286):

Department of Penal Institutions
Attention: Mr. K. Autenrieth

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Oct. 6, 1944

"But the common parlance of the country, and the common practice of the country, have been to consider all those things as farming products or agricultural products which had the situs of their production upon the farm, and which were brought into condition for the uses of society by the labor of those engaged in agricultural pursuits, as contradistinguished from manufacturing or other industrial pursuits."

Section 396b (18 U.S.C.A.) forbids the transportation or procuring of transportation of any goods, wares and merchandise produced wholly or in part by convict labor into any state "where said goods, wares and merchandise are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State * * *." We have examined the statutes of the State of Ohio and we do not find any statute of that State which forbids the use of articles manufactured or produced by convict labor by the state or its political subdivisions. Ohio does have a statute which requires the marking or labeling of said articles before being offered for sale, but in your case the articles will not be offered for sale, and hence you could not be charged with knowing that the articles are to be sold or used in violation of the Ohio statute. Therefore, Section 396b, supra, will not prevent you from shipping the green beans to the Department of Public Welfare of the State of Ohio.

Section 396c (18 U.S.C.A.) provides as follows:

"All packages containing any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the

Department of Penal Institutions
Attention: Mr. K. Autenrieth

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Oct. 6, 1944

nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package."

The latter section clearly requires that you mark all packages containing articles produced wholly or in part by convict labor before shipping them in interstate commerce. Therefore, it will be necessary for you to mark the packages containing the green beans in question, in accordance with the provisions of Section 396c, supra.

Conclusion

It is, therefore, the opinion of this office that you can ship a carload of canned green beans produced by convict labor in the State of Missouri to the Department of Public Welfare of the State of Ohio, but that it will be necessary that you mark the packages containing said beans in accordance with Section 396c (18 U.S.C.A.).

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

HHK:EG

ELECTIONS: Candidate can seek nomination for more than one office on the same party ticket.

April 19, 1944

FILED 5

Honorable William Barton
Member of Missouri Legislature
Jonesburg, Missouri



Dear Sir:

The Attorney-General acknowledges receipt of your letter of April 14, 1944, requesting the opinion of this Department. Your letter reads as follows:

"Please give me information if one person may file at the primary for more than one office as a candidate. I am particularly interested in county offices.

"Perhaps you have an opinion on file or can give me some information in answer to the above without going to the trouble of writing an opinion as I would like to have this information before April 25th, and many thanks."

The following statement is a portion of the opinion written by Judge Ellison in the case of State ex rel. Neu v. Waechter et al., appearing in 58 S. W. (2d) 971, 1. c. 974:

"The other reason assigned by the respondent election commissioners is that under the provisions of section 10441, R. S. Mo. 1929, the relator could not become a candidate for the Republican nomination for mayor because he had previously filed as a candidate for alderman and could not withdraw, and furthermore could not run for two places on the same ticket. This calls for a construction of the statute, which is as follows:

"(1) No person shall file more than one written declaration indicating the party designation under which his name is to be printed on the official ballot, (2) and it shall be unlawful for his name to appear on more than one ballot at said primary election, (3) and all declaration papers shall be filed with the board of election commissioners of such city, and such declaration papers shall not be withdrawn, (4) but the names of candidates who so declare shall be printed on the official primary ballot."

"For convenience in reference we have divided the section into four parts by the insertion of numbers in parentheses. The first provision is that 'no person shall file more than one written declaration indicating the party designation under which his name is to be printed on the official ballot.' The second provision is that 'it shall be unlawful for his name to appear on more than one ballot at said primary election.' (All italics ours.) Turning to sections 10448 and 10449 R. S. 1929 (Mo. St. Ann. Secs. 10448, 10449), we find the law requires each declarant to specify in his declaration the party upon whose ticket he proposes to run; and further requires the names of all candidates to be grouped by the election board under their respective party designations, one form of ballot being provided for each political party, or group, as defined in another section, section 10438, R. S. 1929 (Mo. St. Ann. Sec. 10438). Considering all these statutes together, it is obvious that the first two parts of the quoted section 10441 mean no more than they plainly say; namely, that a candidate cannot file or stand for nomination on more than one party ticket at the same election. The first provision of said section 10441 is identically the same as the opening language of section 5862, R. S. Mo. 1909, now section 10260, R. S. Mo. 1929 (Mo. St. Ann. Sec. 10260), in the general

April 19, 1944

primary law, and the latter section was so construed nearly twenty years ago in State ex rel. Dunn v. Coburn, supra, 260 Mo. 177, 168 S. W. 956, cited by relator in his petition.

"There is absolutely nothing in section 10441 justifying respondents' contention that a candidate cannot seek nomination for more than one office on the same party ticket. Neither will section 18, art. 9, of the state Constitution, bear that construction. It provides 'no person, shall, at the same time, fill two municipal offices' (*italics ours*); but it does not say a person shall be ineligible for nomination to more than one office. See State ex rel. McAllister v. Dunn, 277 Mo. 38, 209 S. W. 110, and 46 C. J., Sec. 55, p. 947. There is, however, a section in the general primary law, section 10244, R. S. Mo. 1929 (Mo. St. Ann. Sec. 10244) which squarely provides 'no person shall accept a nomination to nor be published as a candidate for more than one office.' * * * * *

We believe that the above and foregoing statement is squarely in point and is decisive of the question contained in your letter.

It is the opinion of this Department that a candidate can seek nomination for more than one office on the same party ticket.

Respectfully submitted,

RALPH C. LASHLY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

RCL:EG

BONDS:

- 1) Payment of premium on surety bond not mandatory on county court.
- 2) County court not authorized to pay part of bond premium.

January 6, 1944



Honorable E. W. Bennett
Prosecuting Attorney
Dent County
Salem, Missouri

Dear Mr. Bennett:

This will acknowledge receipt of your letter under date of December 29, 1943, wherein you requested an opinion from this Department. This opinion request read as follows:

"1. If an officer of the county elects to furnish a surety bond under Section 3238 R. S. Mo. 1939, must the county court consent thereto and pay the premium on such bond?

"2. If county court consents to a surety bond, upon condition that the officer is to pay a part of the bond premium, does this make the county court liable for all of the premium under the above section.

"The county court of this county requests that I get your opinion on the above points, hence this letter.

"Thanking for such assistance as you can give us, I am,"

Section 3238, R. S. Mo. 1939, in so far as applicable to counties reads:

"Whenever any officer * * * of any county of this state, * * * shall be required by law of this state, * * * to enter into any official bond, or other bond, he may elect, with the consent and approval of the governing body of such * * *, to enter into a surety bond, or bonds, with a surety company * * * authorized to do business in the state of Missouri and the cost of every such surety bond shall be paid by the public body protected thereby."

The statute states that 1) if a county official elects to provide a surety bond and 2) the county court consents and approves the election, then the public body protected thereby, in this case the county court, may pay the premium.

In Boatright v. Saline County, 169 S. W. (2d) 1. c. 372, the court said:

"If the statute relied upon did not expressly so state we think it could be justly implied that to render a county liable for a premium on a bond, as the statute contemplates, the bond must be executed for the benefit of the county. However, we need not indulge in any such implication in this case for the statute so provides. Note the concluding portion thereof: '* * * and the cost of every such surety bond shall be paid by the public body protected thereby.'

"The county of Saline was not protected by this bond and therefore it was not one as contemplated by the statute. The statute also provides that the officer, in this case the county collector, may elect, with the consent and approval of a governing body of such county, to enter into a surety bond and the costs shall be paid by the county. It is apparent that the legislature intended the county to be liable only in case the county court consented thereto and approved the giving of such a bond." (Emphasis ours.)

A later case, Cox v. Polk County, 173 S. W. (2d) 680, affirmed the Boatright case by stating that the body to be protected, the county court, must expressly assume liability for payment, in addition to its consent and approval of the bond.

CONCLUSION

It is our opinion that it is not mandatory that the county court consent to and approve payment of the premium on surety bonds under Section 3238, R. S. Mo. 1939. Further, that the statute provides only that the county court, or other

public body designated therein, may, in effect, only refuse or agree to pay the bond premium.

Respectfully submitted,

RALPH C. LASHLY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

RCL:IR

SPECIAL ROAD DISTRICT:
OFFICERS:

Unless the statutes prescribe a salary for the treasurer of a special road district, his services are deemed to be gratuitous.

November 17, 1944

11/20

Honorable E. W. Bennett
Prosecuting Attorney
Dent County
Salem, Missouri



Dear Mr. Bennett:

This department acknowledges receipt of your recent letter in which you request the opinion of this office on certain questions. Your letter reads as follows:

"The County Court of Dent County, Missouri desires the opinion of your office on the authority of Special Road Commissioners appointed under chapter 46, article 10, Revised Statutes of Missouri 1939. On the following points, to wit:

- "1. In the appointment of a treasurer for the Special Road District does the commissioners have any authority to pay said treasurer a salary?
- "2. Do said commissioners have authority to appoint one of their number as treasurer and pay such commissioner as treasurer a salary.
- "3. Does said commissioners have authority to pay one of the commissioners for labor done for and material furnished to the Special Road District, other than actual expenses of said commissioners in the performance of their duties.

Section 8679, R. S. Mo. 1939, provides as follows:

"Said board may appoint a treasurer and fix the amount of his bond and prescribe his duties, which said bond shall be filed in the office of the clerk of the county court."

There is no statute contained in Article 10, Chapter 46, specifically providing for the payment of a salary to the treasurer of a special road district organized thereunder. Unless the statute prescribes such a salary the service as treasurer is deemed to be gratuitous. The following statement of this rule appears in *Nodaway County v. Kidder*, 129 S. W. (2d) 857, 1. c. 860:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. *State ex rel. Evans v. Gordon*, 245 Mo. 12, 28, 149 S. W. 638; *King v. Riverland Levee Dist.*, 218 Mo. App. 490, 493, 279 S. W. 195, 196; *State ex rel. Wedeking v. McCracken*, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. *State ex rel. Buder v. Hackmann*, 305 Mo. 342, 265 S. W. 532, 534; *State ex rel. Linn County v. Adams*, 172 Mo. 1, 7, 72 S. W. 655; *Williams v. Chariton County*, 85 Mo. 645."

Hon. E. W. Bennett

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Nov. 17, 1944

The second and third questions contained in your inquiry are answered by two opinions enclosed herewith, one dated October 7, 1942, to Hon. Wilson D. Hill, and one dated June 18, 1935, directed to Hon. G. Logan Marr.

The above and foregoing constitutes the opinion of this department.

Respectfully submitted,

RALPH C. LASHLY
Assistant Attorney General

RCL:EG

APPROVED:

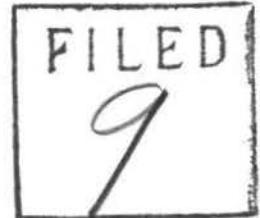
VANE C. THURLO
(Acting) Attorney General

HABEAS CORPUS
AD PROSEQUENDUM:

The appearance of persons imprisoned may be secured by writ of habeas corpus ad prosequendum in order to prosecute them on indictments for a felony in another jurisdiction in Missouri.

March 21, 1944

Mr. Charles T. Bloodworth
Special Prosecuting Attorney
Butler County
Poplar Bluff, Missouri



Dear Sir:

We acknowledge receipt of your letter of March 16th, 1944, addressed to Honorable Roy McKittrick, Attorney-General of Missouri, requesting an opinion respecting the facts set out in your letter, as follows:

"I wish an opinion and advice on procedure in regard to the following:

"Two men committed a felony in Butler County last year, and at about the same week, also committed a felony in Dunklin County. They were charged both in Butler County, and in Dunklin County, and were convicted in Dunklin County, before they could be tried here, and each sentenced to the penitentiary, and are now in the Intermediate Reformatory for young men. The cases against them here, are pending in the Circuit Court, and we desire to try them, and dispose of the cases at the coming April term.

"We have communicated with authorities, and Mr. Adams, Superintendent of the Intermediate Reformatory advises me that he will be glad to turn them over to the Sheriff upon writs of habeas corpus. I am very much in doubt as to the jurisdiction of the Circuit Court here to entertain habeas corpus proceedings for prisoners in Cole County, though, from the letter

received from Mr. Adams, it appears that that is what he suggests. It would put excessive expense and costs on the State or County to have to go to Cole County to institute habeas corpus proceedings.

"I would appreciate it very much if you would give me your opinion as to what procedure I should pursue to bring these prisoners back here for trial, and as to whether or not the Circuit Court here can issue a writ of habeas corpus against the Superintendent of, or the Intermediate Reformatory for young men."

On consideration of the proposition involved in your inquiry, namely, whether you are entitled as a matter of law to secure the delivery of the bodies of the two men committing the felony in Butler County, as stated by you, so that they can be brought into the Circuit Court of Butler County to answer indictments now perfected and pending against them in said County of Butler, we believe that by the application for and issuance of the writ of habeas corpus ad prosequendum you can lawfully return them to Butler County for prosecution.

The application for the writ of habeas corpus may be properly entertained, and the writ of habeas corpus ad prosequendum issued by the Circuit Court of Butler County, Missouri, if in session, otherwise, by the judge in vacation.

In support of the above, we cite the following authorities: State ex rel. Billings v. Rudolph, 322 Mo. 1163; State ex rel. Meininger v. Breuer, 304 Mo. 381, 13 Corpus Juris, Sec. 14, pages 919, 920.

CONCLUSION

This department is, therefore, of the opinion that you have the absolute right, and can secure the presence and

bodies of the defendants committing the felony you name, by the issuance of the writ of habeas corpus ad prosequendum, in order to procure the attendance of the two defendants for the trial of the cause on the charges preferred against them, in Butler County, Missouri.

Respectfully submitted,

EDGAR B. WOOLFOLK
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

EEW:CP

RECORDER OF : Must collect and account for fees
: for recording deeds and other
DEEDS. : instruments recorded by county.
:

September 14, 1944

FILE

9

Miss Dollie Blake
Circuit Clerk and Ex-Officio Recorder
Worth County
Grant City, Missouri

Dear Miss Blake:

This will acknowledge the receipt of your letter of August 24th, requesting an opinion from this office, which is as follows:

"May I have your opinion as to whether or not the County should pay recording fees to the Recorder for Right-of-Way deeds, Trustee's Deeds, ect., that they file for record in that office.

"Our County Judges take the position that there is no need of paying these fees, since the County Recorder turns all fees to the County Clerk anyway at the end of each month, and it makes a bit of added bookkeeping for them to pay out these fees.

"From the Recorder's standpoint of view this makes an item on the daily record and price therefor, but when the price is not received, it makes totals needing amendment.

"Please give me your opinion as to whether or not the fees should actually be paid in hand to the Recorder."

Section 13408 R. S. Mo., 1939 provides:

"The clerks of the circuit courts of this state shall receive for their services annually the following sum: In counties having a population of less than seven thousand five hundred persons the sum of twelve hundred (\$1200) dollars; provided that in any county wherein

the clerk of the circuit court is ex-officio recorder of deeds, said officers shall be considered as one for the purposes of this section: Provided, it shall be the duty of the circuit clerk, who is ex-officio recorder of deeds to charge and collect for the county in all cases every fee accruing to his office as such recorder of deeds and to which he may be entitled under the provisions of Sec. 13426 or any other statute. * * * (Underscoring ours).

Sec. 13426, R. S. Mo., 1939, provides:

"Recorders shall be allowed fees for their services as follows:
For recording every deed of instrument for every hundred words..... \$0.10
In addition to the above fee for recording deeds, they shall be allowed for recording every such instrument relating to real estate, a fee of ten cents, as a compensation for making and preserving direct and inverted indexes to every book containing deeds affecting real estate.
For every certificate and seal..... .50
For recording a plat of survey, if not more than six courses..... .40
For every course above six of the same .02
For copies of plats, if not more than six courses40
For every course above six02.

(R. S. 1929, Sec. 11804.)"

It must be noted that Sec. 13426 provides a specified fee for the recorder for recording every deed of instrument. This would clearly include deeds recorded by the county. True, in view of the provisions of Sec. 13408 your collection of these fees would make no difference in your salary and you would have to pay them back to the County, however, the county might conceivably pay for these deeds out of a particular fund and when you paid the money back it would go into the general fund from which your salary and other legitimate county expenses are paid. Also it should be pointed out that to hold that Sec. 13426 did not require counties to pay these fees would be a holding that would materially effect the compensation of those recorders who are dependent on fees, such as those

Miss Dollie Blake

-3-

Sept. 14, 1944

who come under the provisions of Sec. 13187 R. S. Mo., 1939. This would work a hardship on them, clearly not contemplated by the law.

CONCLUSION.

It is therefore the opinion of this office that a recorder of deeds must collect and account for fees for instruments recorded by the county, even though he is a salaried officer.

APPROVED:

Respectfully submitted

ROY McKITTRICK
Attorney General
RJR:LeC

ROBERT J. FLANAGAN
Assistant Attorney General

CONSERVATION COMMISSION:
CONSTITUTION:

Conservation Commission is unauthorized to pay out public funds for a short-term insurance policy on conservation agents for two-day open deer season.

August 24, 1944

8-29
FILED
10

State Conservation Commission
Jefferson City, Missouri

Attention Mr. I. T. Bode, Director

Gentlemen:

This will acknowledge receipt of your request for an official opinion under date of August 17, 1944, which reads:

"I should like to have from your office an official opinion as to whether or not the Conservation Commission could legally pay the premium on short-term insurance to cover our agents during the deer season, which has been established for November 2 and 3 for this year."

The Conservation Commission was created by virtue of Section 16, Article XIV, of the Constitution of the State of Missouri, which vests in that body very broad powers to regulate, control, manage, and conserve the wildlife resources of the State of Missouri, and practically leaves to the discretion of the Conservation Commission the manner of executing such authority. Said Amendment reads:

"The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wild life resources of the State, including hatcheries, sanctuaries, refuges, reservations and all other property now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of the same, and the administration of the laws now or hereafter pertaining thereto, shall be vested in a commission to be known as the Conservation Commission, to consist of four members to be

appointed by the Governor, not more than two of whom shall be members of the same political party. The commissioners shall have knowledge of and interest in wild life conservation. Vacancies shall be filled by appointment by the Governor for the unexpired term within thirty days from the date of such vacancy; on failure of the Governor to fill the vacancy within thirty days, the remaining commissioners shall fill the vacancy for the unexpired term. The first members of said commission shall be appointed for terms, as follows: one for a term of two years, or until his or her successor is appointed and qualified; two for terms of four years, or until their respective successors are appointed and qualified; one for a term of six years, or until his or her successor is appointed and qualified. Upon the expiration of each of the foregoing terms of said commissioners, a successor shall be appointed by the Governor for a term of six years, or until his or her successor is appointed and qualified, which term of six years shall thereafter be the length of term of each member of said Commission. The members of said Commission shall receive no salary or other compensation for their services as such. The members of the Commission shall receive their necessary traveling and other expenses incurred while actually engaged in the discharge of their official duties. Said Commission shall have the power to acquire by purchase, gift, eminent domain, or otherwise, all property necessary, useful or convenient for the use of the Commission, or the exercise of any of its powers hereunder, and in the event the right of eminent domain is exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the State Highway Commission. A Director of Conservation shall be appointed by the Commission and such director shall, with the approval of the Commission, appoint such assistants and other employees as the Commission may deem necessary. The Commission shall determine the qualifications of the director, all

assistants and employees and shall fix all salaries, except that no commissioner shall be eligible for such appointment or employment. The fees, monies, or funds arising from the operation and transactions of said Commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wild life resources of the State and from the sale of property used for said purposes, shall be expended and used by said Commission for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wild life resources of the State, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto and for no other purpose. The general assembly may enact any laws in aid of but not inconsistent with the provisions of this amendment and all existing laws inconsistent herewith shall no longer remain in force or effect. This amendment shall be self-enforcing and go into effect July 1, 1937."

We think it will be conceded by nearly everyone that it is not essential to the control, management, restoration, conservation, and regulation of wildlife in this state, that a short term life insurance policy be taken out on each agent during the open deer season, which consists of only two days. In this state it has been permissible heretofore to hunt deer, and, so far as we know, at no time did any state department take out insurance on its agents during the open season. It might be argued that it would be just as essential to take out a term policy on the hunters, or further that various state departments should be permitted to take out insurance on its employees traveling upon the highways of this state, for the benefit of said employees.

As we read your request, we assume that the Conservation Commission contemplates paying for said premium, and that should any accident occur, the family or others named by the agent would be the beneficiaries under said insurance policy, and not the Conservation Commission. In other words, it is for the sole benefit of the agent. It is something that normally would be expected of the agent and not his employer. This might be con-

sidered the taking of public funds and appropriating them for a private purpose, which, if true, is in direct violation of the Constitution.

Section 46, Article IV, of the Constitution of the State of Missouri is an inhibition against the granting of public funds to individuals, and reads:

"The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, That this shall not be so construed as to prevent the grant of aid in a case of public calamity."

Furthermore, Section 19, Article X, of the Constitution of the State of Missouri provides that no money shall ever be paid out of the state treasury of this state without an appropriation act specifying the amount and object for which it is to be applied. Said section reads:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have been issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

While there has heretofore been some question as to the necessity of an appropriation act by the General Assembly for the Conservation Commission, we will not go into that at this time, but assume, for the sake of this opinion, that it is a necessary prerequisite for obtaining money for expenditures

incurred by the Conservation Commission. If such be the case, then we must look to the appropriation act to be guided by the nature of expenditures contemplated when the General Assembly passed said appropriation bill. In Section 18, Laws of 1943, page 227, we find the appropriation bill as passed by the 62nd General Assembly for the Conservation Commission for the biennium 1943-1944, and nothing contained therein specifically authorizes the purchase of life insurance on conservation agents.

If we follow the provisions of Section 19, Article X, of the Constitution, supra, then absent an appropriation by the General Assembly, such an expenditure as is herein contemplated would be invalid.

Furthermore, there are certain exceptions to the foregoing constitutional provisions prohibiting expenditure of public funds to individuals, such as for the payment of pensions, etc., but as a general rule such amendments making exceptions to the general rule are limited to firemen, policemen, members of educational institutions, etc., and none could be construed so as to grant term insurance for conservation agents, as mentioned in your letter.

Section 47a, Article IV, of the Constitution of the State of Missouri provides that nothing in this Constitution shall prevent grants from public funds to persons employed and paid out of any public funds, for educational services, and reads:

"Nothing in this Constitution contained shall be construed as prohibiting payments, from any public funds, into a fund or funds, for paying benefits, upon retirement, disability, or death, to persons employed and paid out of any public fund, for educational services, their beneficiaries, or their estates."

Section 47, Article IV, of the Constitution further provides that nothing in the Constitution shall prohibit the General Assembly from authorizing any municipality in this state to pass ordinances pensioning members of the fire department and widows and minor children of deceased members thereof; also said section permits the payment of blind pensions and old age pensions, which could not be paid absent a constitu-

tional provision so authorizing such payments.

Likewise, Section 48a of Article IV provides authorization for pensioning policemen.

From a reading of the foregoing constitutional provisions, it is easy to see that it was definitely intended that public funds should never be expended for private purposes, but only for public purposes, except when some specific exception is contained in the Constitution itself, such as found in Sections 47a, 47 and 48a of Article IV, supra.

Furthermore, Section 16 of Article XIV, supra, provides that the fees, monies or funds arising from the operations and transactions of the Commission "shall be expended and used by said Commission for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wild life resources of the State, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto and for no other purpose," which, in the opinion of the writer, would of itself prohibit the purchase of term insurance.

The only power vested in the Conservation Commission is derived by virtue of the provisions of Section 16, supra. As stated in Aetna Ins. Co. v. O'Malley, 124 S. W. (2d) 1. c. 1166:

" * * * 59 C. J., section 285, page 172, section 286. In the last citation the author says: 'Public officers have and can exercise only such powers as are conferred on them by law, * * *.'"

As the writer reads this Amendment, there is only one provision therein that could possibly permit the purchase of a term insurance policy, and that reads:

" * * * The Commission shall determine the qualifications of the director, all assistants and employees and shall fix all salaries, except that no commissioner shall be eligible for such appointment or employment. * * *"

We contend that by the use of the word "salary" it was never contemplated that the Commission in fixing a salary could partially compensate the employee in money and pay the balance with a term insurance policy upon the agent, payable at death to the beneficiary of said agent, and not the Commission, but that by the use of the word "salary" in the foregoing Amendment the intention was that a certain stipulated amount of money was to be paid said employees monthly or annually. That is the ordinary and usual construction given the word "salary" when referring to the salary of a public officer or employee.

Funk & Wagnalls New Standard Dictionary defines "salary" in the following manner:

"A periodical allowance made as compensation to a person for his official or professional services or for his regular work."

If the people of this state in adopting the Conservation Amendment had intended that the Conservation Commission should pay for term insurance on the life of any agent, they could have so stated in the Amendment, but by the use of the word "salary" undoubtedly they intended such employees should be paid a certain stipulated amount of money.

In Kogel v. McGoldrick, 45 N. E. (2d) 817, 1. c. 819, the Court of Appeals of the State of New York in construing the words "salary or compensation" as used in Section 245 of the Military Law, Consol. Laws, ch. 36, said:

" * * * The 'salary or compensation' for military service referred to therein must be taken to mean the regular 'pay' of an army officer as distinguished from the 'allowances' which he may receive in substitution for subsistence, quarters, and like military essentials which are usually supplied by the government in kind."

In Rebadow et al. v. Buffalo Savings Bank, 117 N.Y.S. 282, 1. c. 284, the court said:

"The first and second causes of action are sufficiently pleaded. A salary is a fixed sum to

be paid by the year or periodically for services. Burrill's Law Dictionary. * * *

In the case of *In re Chancellor*, (Md.) 1 Bland, 595, 1. c. 630, the court defines "salary" as follows:

"A salary is a compensation for services rendered; it is the periodical payment of a certain value, in money, * * *."

Certainly, in view of the foregoing authorities defining "salary", the Conservation Commission would not be permitted to pay for a short term policy on its agents during the two-day open deer season, under the Conservation Amendment.

Furthermore, the Workmen's Compensation Act lends some assistance in determining your request, for the reason that Act specifically provides in Section 3694, R. S. Missouri, 1939:

"The word 'employer' as used in this chapter shall be construed to mean:

* * * * *

"(b) The state, county, municipal corporation, township, school or road, drainage, swamp and levee districts, or school boards, board of education, regents, curators, managers or control commission, board or any other political subdivision, corporation, or quasi-corporation, or cities under special charter, or under the commission form of government, which elects to accept this chapter by law or ordinance. * * *"

which indicates that the General Assembly of the State of Missouri is of the opinion that, prior to the foregoing enactment, neither the state nor any political subdivision thereof had been authorized to take out insurance on employees and pay for said insurance out of public funds. Whether such a provision in the Workmen's Compensation Act relative to the state or any political subdivision thereof electing to come within the Act

August 24, 1944

is constitutional, we need not pass upon at this time. However, at no time has the state ever elected to come under the said Workmen's Compensation Act, and therefore it is not subject to the provisions thereof.

CONCLUSION

Therefore, in conclusion, we are of the opinion that to permit the Conservation Commission to pay for such short-term insurance policies as contemplated by your request would amount to the payment of public funds for private purposes, in direct violation of the Constitution of the State of Missouri, and furthermore the Conservation Commission would be exceeding its constitutional authority under Section 16, Article XIV, supra.

Respectfully submitted

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

ARH:HR

STATUTE OF
LIMITATIONS.

: Under Section 1015, R. S. Mo., 1939,
: actions against circuit clerk and ex-
: officio recorder for liability incur-
: red by acts in official capacity must
: be brought within three years from
: date cause accrues in the absence of
: a showing of fraud or concealment.

March 22, 1944

3.29



Honorable Llyn Bradford
Prosecuting Attorney, Phelps County
Rolla, Missouri

Dear Mr. Bradford:

This will acknowledge the receipt of your letter under date of March 18, 1944, in which you request an opinion from this office. The text of such letter is as follows:

"In July, 1939, a former Circuit Clerk & Recorder of Phelps died, and according to the report of the State Auditor's Office after a recent audit of this County, he was in arrears something over \$1200 on Circuit Clerk fees collected but not turned into the County Treasurer. The County Court is requesting that I take action on the bond for the collection of this shortage. The bonding company takes the position that this action is barred by the 3-year statute of limitations in Missouri, under Section 1015, R.S. Mo. 1939. The following citations seem to me to bear out their contention:

Shelby County v. Bragg, 135 Mo. 291;
Putnam County vs. Johnson, 259 Mo. 73;
City of St. Joseph vs. Wyatt, 203 S. W. 819;

"I would appreciate your opinion with reference to whether the three-year or the five-year statute of limitations would apply under these conditions. There are no circumstances that I know of that would tell the limitation period, and it is simply a question of which limitation applies."

Section 1015, R. S. Missouri, 1939, provides:

"Within three years: First, an action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the commission of an official duty, including the non payment of money collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state."

In the City of St. Joseph v. George N. Wyatt, 274 Mo. 566, the court states that this section applies to actions on official bonds except where some fraud or concealment is plain which prevented discovery of the defalcation or shortage. The court at page 575 states "Statutes of Limitations are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within some exception. A party seeking to avoid the law of the statute on account of fraud must aver and show that he used due diligence to detect it and if he had the means of discovery in his power, he will be held to have known it." See also Shelby County v. Bragg, 135 Mo. 291. Putnam County v. Johnson, 259 Mo. 73.

You make no mention in your letter of any facts on which to ground fraud or concealment and in the absence of such a showing it must be held that the three year statute applies.

The three year statute begins running from the date the cause of action accrues. In State ex rel, Buchanan County v. Fulks, 296 Mo. 614, where the suit was on a collector's bond for excess fees retained, the court stated that the cause began at the end of the fiscal year when the defendant made his annual accounting.

At page 631

"It was then at the end of the fiscal year, that he was required to make this detailed statement under oath and immediately pay over the excess of fees and commissions

Mar. 22. 1944

received by him. At that time and not until then could the excess of commissions and fees received by the collector become due and payable. Failing to pay it over when the statutes made it due and payable he was then, and not until then in default and the cause of action then accrued.

CONCLUSION.

It is therefore the conclusion of this office that the three year limitation of Section 1015, R. S. Missouri, 1939, applies to actions against circuit clerks and ex-officio recorders upon a liability incurred by the doing of an act in an official capacity, in absence of showing of fraud or concealment.

Respectfully submitted

ROBERT J. FLANAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RJF:LeC

PRIMARY: Last filing date for candidates for August 1944
primary is April 25, 1944.

CANDIDATES:

April 20, 1944

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri



Dear Senator Brown:

We have your letter of recent date in which you request us to give our official opinion as to the last date upon which a candidate may file a written declaration as a candidate for the August 1944 primary. The primary this year is on Tuesday, August 1, 1944.

The Sixty-second General Assembly of Missouri in Special Session passed Senate Bill No. 4, with an emergency clause which repealed Section 11550, R. S. Mo. 1939, with reference to the time for candidates filing their written declaration of candidacy.

Senate Bill No. 4 fixes the last day for filing for the August primary as the last Tuesday of April preceding such primary. This Act was signed and approved by the Governor April 17, 1944 and thereby became immediately effective.

* Therefore, the last day for filing as a candidate for the August 1944 primary is Tuesday, April 25, 1944.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

CRM:CP

: Judges and Clerks of School elections
SCHOOLS.: not criminally liable for opening bal-
: lot boxes after school election, provided
there is no violation of Sec. 4357, R.S.
~~R.S.~~ Mo., 1939.

April 28, 1944

FILED

12

Mr. Tom B. Brown
Prosecuting Attorney
Knox County
Edina, Missouri

Dear Mr. Brown:

This will acknowledge the receipt of your letter in which you request an opinion from this office. The text of such letter is as follows:

"A school election was held at Baring, Missouri, on Tuesday April, 4th to elect two directors for a three year term and one director for a two year unexpired term. The district is a town district. The count of the votes resulted in more votes for the total directors that could be possible from the number of voters.

"The following day at the suggestion of the superintendent of the school or of the board of directors the judges and clerks of the election opened the ballot box and recounted the ballots. Complaint has been made to me that the reopening and recounting of the ballots is a felony. Please advise me if the act is a violation of law and if so what section.

"In addition to the above one old director and one elected at this election is not a taxpayer. Does this disqualify them to serve? Would the fact that the wife of one director was a taxpayer and had paid taxes on real estate qualify the husband? If the director held an interest in real estate that was assessed in the name of another and the tax paid by another could he qualify?

"I wish to thank you for your opinion in this matter and for former opinions given me. I also wish to compliment you on your 'report and digest of opinions.'" "

Section 10483 R. S. Mo., 1939, provides:

"The qualified voters of such town, city or consolidated school district shall vote by ballot upon all questions provided by law for submission at the annual school meetings, and such election shall be held on the first Tuesday in April of each year, and at such convenient place or places within the district as the board may designate, beginning at 7 o'clock a. m. and closing at 6 o'clock p. m. of said day. The board shall appoint three judges of election for each voting place, and said judges shall appoint two clerks; said judges and clerks shall be sworn and the election otherwise conducted in the same manner as the elections for state and county officers and the result thereof certified by the judges and clerks to the secretary of the board of education, * * *"

Under this section the general election law relative to the opening of ballot boxes must be examined to find whether the judges and clerks here violated any law.

Sec. 11608, R. S. Mo., 1939, provides:

"The judge to whom any ticket shall be delivered shall, upon receipt thereof, pronounce in an audible voice the name of the voter; and if the judges shall be satisfied that the person offering to vote is a legal voter, his ticket shall be numbered and placed in the ballot box without inspecting the names written or printed thereon, or permitting any other person or persons to do so; and the clerks of election shall enter the names of voters and the numbers of the ballots, in the order in which they were received, in the poll books, in conformity with the form printed in section 11490, and, in addition, whenever a registration is required by law, place on such ballot the number corresponding with the number opposite the name of the person voting, found on the registration list; and no ballot not so numbered shall be counted, and the ballots, after being counted, shall be sealed up in a package and delivered to the clerk of the county court or corresponding officer in any city not within a county, who shall

deposit them in his office, where they shall be safely preserved for twelve months; and the said officer shall not allow the same to be inspected, unless in case of contested elections, or the same become necessary to be used in evidence, and then only on the order of the proper court, or a judge thereof in vacation, under such restrictions for their safekeeping and return as the court or judge making the same may deem necessary; and at the end of twelve months, said officer shall publicly destroy the same by burning, without inspection; and no judge or clerk of an election shall disclose the names of the candidates voted for by any voter, and any judge or clerk violating the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of one hundred dollars."

This is the general law relative to the opening of ballot boxes after election. However, see Sec. 11629, R. S. Mo., 1939, specifically provides:

"This article shall not apply to elections for public offices determined otherwise than by ballot, to township or village elections, to school elections, or elections of county commissioners of public schools, or elections for road overseers, or to any city election in cities of the fourth class, or city of under 3,000 inhabitants existing under any special law. "

Thus we see that Sec. 11608 aforementioned does not apply to school elections.

CONCLUSION.

It is therefore, the opinion of this office that there is no criminal provision extant in our law rela-

Mr. Tom Brown

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4-28-44

tive to the opening of ballots after a school election, provided, of course, there has been no changing of the ballots or election returns in violation of Sec. 4357 R. S. Mo., 1939.

With regard to the question as to qualifications of director, I wish to refer you to Sec. 10420, R. S. 1939, which provides:

"The government and control of the district shall be vested in a board of directors composed of three members, who shall be citizens of the United States, resident taxpayers of the district, and who shall have paid a state and county tax within one year next preceding his, her or their election, and who shall have resided in this state for one year next preceding his, her or their election or appointment, and shall be at least twenty one years of age. Said directors shall be chosen by the qualified voters of the district at the time and in the manner prescribed in section 10418 of this article, and shall hold their office for the term of three years, and until their successors are elected or appointed and qualified, except those elected at the first annual meeting held in the district under the provisions of this chapter, whose term of office shall be for one, two and three years, respectively. A qualified voter within the meaning of this chapter shall be any person who, under the general laws of this state, would be allowed to vote in the county for state and county officers and who shall have resided in the district thirty days next preceding the annual or special meeting at which he offers to vote."

You will note that under this section the director must be a taxpayer and must have paid a state or county tax within one year next preceding election. With regard to your other question relative to qualifications, I enclose an opinion of this office on April 6, 1940, to Stephen Cornish, Superintendent of Schools of Pike County, which I feel answers your question.

Respectfully submitted

APPROVED:

ROBERT J. FLANAGAN
Assistant Attorney General

ROY McKITTRICK
Attorney General

Encl.
RJF:LeC

PROBATION AND PAROLE: Board of Probation and Parole has
DESTRUCTION OF RECORDS: no authority to destroy permanent
files and records of department.

February 15, 1944

Mr. Donald W. Bunker, Director
Probation and Parole
Jefferson City, Missouri



Dear Sir:

We have for attention your letter of February 9th, in which you request an opinion from this department on the question therein submitted. Your letter is as follows:

"The Board of Probation and Parole should like to have an opinion from your office regarding the following question:

"Does the Board of Probation and Parole have the authority to destroy the parole files of former inmates who have been released from parole supervision for a period of five years?

"Our reason for requesting this opinion is that the store-room where these old files are stored is no longer large enough to accommodate additional parole files. Before destroying each file we would transfer all pertinent information to a card which we have for that purpose, and such card would be considered the permanent record on the case. We have found that whenever we need to refer to the parole file of an individual who has been discharged from parole for a period of longer than five years, the only information we need is that which could be transferred to a card."

The question which you ask, "Does the Board of Probation and Parole have the authority to destroy the parole

files of former inmates who have been released from parole supervision for a period of five years?" is very general in scope and it is not clear what you mean by the "parole files of former inmates."

The Board of Probation and Parole was created by the Laws of Missouri, 1937, and the sections dealing with that board are set forth at pages 400, et seq.

The duties of said board are set forth under Section 9163, R. S. Mo. 1939, which authorizes the board to make a study of all prisoners in the penitentiary in order to determine which of said prisoners may, with safety to society, be paroled, and make a detailed individual report of such study to the Governor. After the said report has been made to the Governor he may make such orders and recommendations concerning such paroles and regulations as he may deem advisable and proper.

Under Section 9161, R. S. Mo. 1939, the board shall employ such assistants and employees as may be necessary to carry out the provisions of this article.

Under Section 9164, R. S. Mo. 1939, there is a provision for the collection of information and data, which information shall be privileged and shall not be receivable in court, and shall not be disclosed directly, or indirectly, to anyone other than the members of the Board of Probation and Parole and judges entitled under said article to receive said report, unless, and until, otherwise ordered by said board or judge.

We do not find any provision in the Board of Probation and Parole Act authorizing it to destroy any records or data that may be collected by the board, even though it may be for a prisoner who may have been released from parole supervision for a period of five years or more. Of course, the board has a certain reasonable discretion in determining what files and records are of permanent nature and should be retained for future use of the department. However, you may be the judge of what records and documents are of a permanent value and necessary to preserve a record of matters coming before your board. So long as the board retains in the files sufficient information which would reflect the disposition and authority for the recommendation to the Governor of the prisoner whose record has been referred to it for attention, we think that is all the law requires.

The general rule with reference to the destroying of public records is stated in American Jurisprudence, Vol. 5, Section 12, as follows:

"Public records and documents are the property of the state and not of the individual who happens, at the moment, to have them in his possession, and when they are deposited in the place designated for them by law, there they must remain, and can be removed only under authority of an act of the legislature and in the manner and for the purpose designated by law. The custodian of a public record cannot destroy it, deface it, or give it up without authority from the same source which required it to be made. Thus, an indictment duly filed cannot be removed legitimately by anyone, including the district attorney, except for purposes of the trial thereon, * * * * *"

There is no hard and fast rule which would govern your action in ordering the destruction of certain papers or other documents, and, in the absence of a statute authorizing their destruction, we would say that you have no such authority.

CONCLUSION

It is, therefore, our opinion that the Board, in the first instance, may determine what files and records are of permanent value and may order the destruction of insignificant and inconsequential data which may have been collected in the performance of their duty. However, records, or data, which may be a part of the permanent records should not be destroyed and the destruction of any records should be done with extreme caution.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

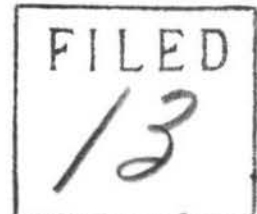
APPROVED:

ROY McKITTRICK
Attorney-General

CHILDREN: Court is authorized under Section 9611B, Laws
ADOPTION: of 1941, page 319, to issue order allowing in-
spection of records and files in adoption cases.

March 7, 1944

3/14



Honorable L. M. Bywaters
Assistant Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

We are in receipt of your letter of February 21, 1944, in which you request an opinion from this department, as follows:

"Enclosed herewith you will please find a copy of a letter received by Judge James S. Rooney from the County Social Security Commission of Carroll County, Missouri, which I believe is self explanatory. Judge Rooney has requested that I ask your department for an opinion as to the legality and propriety of an order made by him allowing the County Social Security Boards to inspect and copy the records in adoption cases as filed in the Circuit Clerk's office of the respective county."

Section 9611B, Laws of Missouri, 1941, page 319, reads as follows:

"The files and records of the court in adoption proceedings shall not be open to inspection, or copy, by any person or persons, except upon an order of the court expressly permitting the same."

March 7, 1944

Your request is for an opinion as to the legality and propriety of an order of the court in adoption cases allowing certain inspection of records. Under the express provisions of the above statute, an order by the court allowing such inspection of the records and files in adoption cases would be legal. Any inspection by agents of the Social Security Board of such files and records without such an order would be unauthorized and illegal. If you mean to inquire as to the constitutionality of this section, that, of course, is a matter for the courts to determine.

We believe we would encroach upon the prerogative of the court in passing upon the propriety of such an order. We believe that is a matter entirely within the court's discretion. However, the type of information requested and the safeguards thrown around it by the Social Security Board indicate that the confidential character of these records is well preserved.

The above and foregoing constitutes the opinion of this department.

Respectfully submitted

RALPH C. LASHLY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RCL:HR

CRIMINAL LAW. : Officers of Board of Probation
: and Parole may not exercise powers
: of arrest provided by Sec. 9162,
: R. S. Mo., 1939, as far as judicial
: paroles are concerned.
:

November 21, 1944

Mr. Donald W. Bunker, Director
Probation and Parole
Jefferson City, Missouri

11/29

FILE

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Dear Mr. Bunker:

Your letter of November 6, 1944, is as follows:

"The attached 'Parole and Conditional Commutation Violation Warrant' is in use by the State Probation and Parole Officers. You will note that the warrant is in agreement with the Provisions of Chapter 48, Article 8, R. S. Missouri, 1939, and especially Section 9162 thereof.'

"The Board of Probation and Parole should like to have an opinion from you as to whether this type of warrant may be legally used by the State Probation and Parole Officers to be served against probationers from the Circuit Courts of Missouri, if the title of the warrant were to be changed to the title of 'Probation Violation Warrant,' and if the wording of the warrant were to be changed in the following manner in the second paragraph:

"Whereas, it appears that _____ has violated the terms and provisions of his (or her) probation from the _____: now, therefore, under and by virtue of the authority vested in the Board of Probation and Parole of the State of Missouri, and its Parole and Probation Officers by the provisions of Chapter 48, Article 8, R. S. Missouri, 1939 and especially Section 9162 thereof, that upon the request of any parole or probation officer, all peace officers of this State are authorized and required to make arrests and hold persons so arrested subject to the order of any State Parole or Probation Officer, you are hereby requested to arrest the said _____ wherever he (or she) may be found and to hold him (or her) subject to the order of said Parole or Probation Officer of said Board of Probation and Parole issuing this warrant."

Section 9162, R. S. Mo., 1939 provides:

"The parole officers and other employees of the Board shall perform such duties as may be prescribed by said Board. The Board and the parole and probation officers appointed under this article shall have jurisdiction co-extensive with the boundaries of this state, and may make arrests anywhere in the state in the course of their duties under this article. Upon request of the Board or any parole or probation officer, all peace officers of this state are authorized and required to make arrests and to hold a person so arrested subject to the order of the Board or any parole or probation officer."

You will note that the first sentence of this statute provides that "the parole officers and other employees of the Board shall perform such duties as may be prescribed by said Board." Even the last sentence of the section contemplates a parolee who is under the jurisdiction of the Board.

Section 9160 R. S. Mo., 1939 designates the class of parolee over which the Board of Probation and Parole has jurisdiction. It provides:

"The Board of Probation and Parole shall have authority and it shall be its duty to study prisoners committed to State correctional and penal institutions to select prisoners to be recommended to the Governor for parole, commutation of sentence, or pardon; to provide for applications for paroles, commutations of sentence, and pardons; to investigate the merits of such application; to make recommendations to the Governor relative to paroles, commutations of sentence, and pardons; to recommend conditions deemed by them advisable in the case of prisoners whose release on parole, commutation of sentence, or conditional pardon is recommended; to provide for the supervision of persons released on parole or conditional pardon; and to recommend to the Governor the revocation of paroles or conditional pardons when their conditions have been violated. Said Board shall keep and preserve complete files, and records of all prisoners held in or released from state penal and correctional institutions and recommendations made by them relative to such prisoners."

The Board may adopt rules and regulations relative to the eligibility of prisoners for parole. The Board of Probation and Parole may, at the written request of the judge or judges of a court named in Section 1 of this Act, or a board of parole authorized to serve such court, authorize parole officers appointed by said Board to act as probation officers for such court or board of parole."

True the last sentence of this section allows parole officers of the Board to serve the courts as probation officers at their written request. However, the fact that a probation officer may act in a dual capacity could not limit the authority of the courts or extend the authority of the Board.

Section 9156 R. S. Mo., 1939 specifically retains in full force and effect the provisions of Sections 4199 to 4211 R. S. Mo., 1939 which give to the Circuit Courts the power of judicial parole.

True Section 9165 R. S. Mo. 1939, allows the Board to make recommendations to the courts for judicial paroles, however, the section specifically states:

"Such court or the judge thereof upon admitting such convicted person to probation shall retain general jurisdiction over such person and over its judgment and sentence and may at any time revoke said probation and sentence such convicted person for the offense for which he was convicted."

This statute specifically retains all jurisdiction of judicial paroles in the court and therefore, necessarily excludes the Board from any jurisdiction.

Section 9162 supra seems therefore, to be a procedure set up for the use of the Board and its agents and not for the courts. The arrests made by the Board and its agents can only be those "in the course of their duties under this article." The article does not give them jurisdiction over judicial paroles. Sections 4200 and 4201 R. S. Mo., 1939 specifically provide for the procedure

Mr. Donald W. Bunker

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Nov. 21, 1944

for terminating judicial paroles. They were not repealed by the statutes creating and defining the duties of the Board of Probation and Parole.

CONCLUSION.

It is therefore the opinion of this office that agents and parole officers of the Board of Probation and Parole may not exercise the authority relative to ordering peace officers to make arrests as provided by Section 9162, R. S. Mo., 1939 as far as judicial paroles by the courts are concerned.

Respectfully submitted

ROBERT J. FLANAGAN
Assistant Attorney General

APPROVED:

VANE C. THURLO
Acting Attorney General

APPROPRIATION: Section 7 of the Appropriation Act of 1943,
KOCH HOSPITAL: Laws of 1943, Page 22 and 23, and Section
St. Louis, Mo: 15181, Revised Statutes of Missouri, 1939,
construed.

March 22, 1944



Department of Public Welfare
City of St. Louis
St. Louis, Missouri

Attention: Honorable Henry S. Caulfield
Director of Public Welfare

Dear Sir:

We are in receipt of your request of this department
for an opinion of date, February 11, 1944, which request
reads as follows:

"As Director of Public Welfare for
the City of St. Louis, I am the head
of the Department of Public Welfare
and have general supervision over the
hospitals and institutions owned and
operated by the City of St. Louis.

"Included among these is the Robert
Koch Hospital, the Isolation Hospital,
the City Hospital (Max C. Starkloff
Memorial), and the Homer G. Phillips
Hospital. The Robert Koch Hospital
is operated exclusively for tubercular
patients, the Isolation Hospital for
contagious disease patients, and the
City Hospital and Homer G. Phillips
Hospitals are general hospitals.

"The Koch Hospital is located in St.
Louis County, remote from the City.
Largely because of this remoteness,
there is a shortage of help at the
Koch Hospital and because of this,
there is grave difficulty in taking
care of all of the tubercular patients
at the Robert Koch Hospital proper.
Some must be cared for at the Isola-
tion Hospital, and others at the City

and Homer G. Phillips Hospitals. They are being given excellent care at Isolation, City, and the Homer G. Phillips Hospitals, and the physicians resident at Koch visit them there and see that they get proper attention.

"We ask your Department for an opinion of the following question: Assuming that all of the persons who are isolated with the disease of tuberculosis, or under observation for said disease, are admitted to the Koch Hospital, but, on account of the exigencies above described, or other difficulties as to hospitalization, a portion of such patients are placed in other institutions maintained by the City, as charges of the Koch Hospital, will the City of St. Louis have the right to request it be paid, under Section Seven of the Appropriation Act, Laws Of Missouri, 1943, for the weekly keep of such patients if they are actually hospitalized in other City institutions as aforesaid?"

At the outset, we wish to set forth verbatim, Section 7 of the Appropriation Act of the 62nd General Assembly, which is found at Page 22 and 23, Laws of Missouri, 1943, which reads as follows:

"Charity patients of the St. Louis Tuberculosis Hospital.--There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund for the period beginning January 1, 1943 and ending June 30, 1943, the sum of Seventy-five Thousand (75,000.00) Dollars, or so much thereof as may be necessary for the purpose of paying to the St. Louis Tuberculosis Hospital, under the provision of Article 2, Chapter 126, Revised Statutes of Missouri, 1939, the sum of Twelve Dollars and Fifty Cents (\$12.50) per week for each patient admitted to such hospital as a charity patient and maintained there in as required by Section 15181, of

Article 2, Chapter 126, Revised Statutes of Missouri, 1939, Provided the State Auditor shall not audit and the State Treasurer shall not pay any claim out of this appropriation to such hospital unless such claim has been examined and approved by the President of the Board of Managers of the State Eleemosynary Institutions."

The Section 15181, Article 2, Chapter 126, Revised Statutes of Missouri, 1935, referred to in the Appropriation Act, reads as follows:

"All tuberculosis hospitals owned and operated by any city under special charter shall receive the same support for charity patients therein as is now provided for charity patients in county tuberculosis hospitals under the provision of this article. The director of the department of public health of such city shall make a report to the city treasurer once per month giving the names, addresses, and hospital numbers of charity patients in such hospital and the amount necessary for the state to pay. The treasurer of the board shall issue a voucher to the state auditor giving this information and the auditor shall draw his warrant on the state treasurer for the amount shown by such statement and the state treasurer shall pay said warrant to the treasurer of said city, who shall deposit and credit the same to the credit of such hospital for the support of such charity patients, and for no other purpose. Every such hospital shall, so long as the state shall pay not less than twelve and one-half dollars per week per patient for the support of charity patients therein, receive patients from any county in this state in which case every such county shall pay to such hospital the difference between the sum of twelve and one-half dollars per week per patient, and the cost of the care and

support of such patient in such hospital, such cost not to exceed the per capita cost, for the year next preceding, for the care and support of patients in the state sanitarium at Mt. Vernon.

The vital question presented by your request is, in our view, whether or not patients which are admitted to the Koch Hospital must actually be housed under the roof of such hospital before the sum of \$12.50 per week may be approved by the Board of Managers of the State Eleemosynary Institutions, and charged against the Appropriation of \$75,000.00, provided for in Section 7 of the Appropriation Act, *supra*, through the procedure outlined in Section 15181, Revised Statutes of Missouri, 1939, *supra*.

For the purpose of reference, we herewith quote Section 46, Article 4 of the Constitution of Missouri as follows:

"The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, That this shall not be so construed as to prevent the grant of aid in a case of public calamity."

Likewise, we call attention to the case of State ex. rel. City of St. Louis Vs. Seibert, 123 Missouri, 424, where the issue was the validity of a grant to the St. Louis insane asylum, not a State institution. Argument was made that the grant through an appropriation by the Legislature was prohibited by the Constitution of Missouri. The Court in that case had this to say on page 429:

"It may be stated as a generally accepted principle of law that the Legislature with all its plenary powers, regardless of constitutional restrictions and limitations, has no power to raise money by taxation, or appropriate it for purely private purposes; but to insure against an attempt to do so, the constitution in express and positive terms, deprives it of such power by section 46, *supra*. Loan

Association v. Topeka, 20 Wall, 658. If the appropriation complained of had been made for the support of the insane asylum of St. Louis, there could be no doubt of its unconstitutionality.

"That the support of the indigent insane is an object universally recognized as ascharity, can not be questioned. That public money may be applied to the support of that class of unfortunate citizens, is recognized in the liberal support given our public institutions for the insane, as well as by the constitution itself.

* * * * *

"* * * * * The right to appropriate money to a public purpose follows legitimately from the right to tax for the same purpose. The taxing power of the general assembly is only limited, in its objects, to public purposes. If the power to appropriate the money raised by taxation be not prohibited in express terms, or by fair implication, it must be held to exist. And so we think the constitution should be read.

* * * * *

"* * * * * There is no provision that all charity shall be dispensed through the state institutions. Most thoroughfares of the state and in St. Louis, and numbers of the insane from other parts of the state necessarily find their way there. Shall these unfortunates be cared for, at the expense of the state, or turned into the streets to live or die as they may?

"But a private corporation or individual may be the recipient of the funds of taxation, provided that the use be a public one.* * * * *"

Thus, we see from the reading of the excerpt above set forth from the Seibert case that the court ruled that the ultimate grantees were the inmates, and disbursements through a municipal corporation would not invalidate the appropriation.

We feel it is far to assume that the Legislature was mindful of Section 46, Article IV of the Constitution as well as the interpretation that the Supreme Court of Missouri had placed upon a similar appropriation act in the Seibert case. Therefore, if we construe Section 7 of the 1943 Appropriation Act in the light of the Seibert opinion, then it is our view that the Legislature, when they stated in the Appropriation Act in part as follows: " * * the sum of \$75,000.00, or so much thereof as may be necessary for the purpose of paying to the St. Louis Tuberculosis Hospital, * *" which is, as we understand, the Koch Hospital, intended by such wording that the money should be given to the governing body of the hospital and by intendment the governing body of said hospital was to be the disbursing agent of the ultimate grantees (the indigent persons infected with tuberculosis) who were the recipients of such funds provided for in the appropriation. It will also be noted in the Appropriation Act there is contained this wording, " * * the sum of Twelve Dollars and Fifty Cents (\$12.50) per week for each patient admitted to such hospital as a charity patient and maintained therein as required by Section 15181, of Article 2, Chapter 126, Revised Statutes of Missouri, 1939, * * *"

It is our view that through this reference it was the intent of the Legislature that because of the fact that public money was being appropriated the act had to be and was for a public purpose, and the full purpose of the appropriation being to provide funds to defray, in part, the expense incident to caring for that general class of persons who were unfortunate in having contracted the disease of tuberculosis. Therefore, through the reference to Section 15181, supra, the Legislature was referring to all of that class who were being treated as charity patients and in a state of isolation by the City of St. Louis rather than intending to incorporate Article 2, Chapter 126, R. S. Mo. 1939, in the Appropriation Act.

Upon reading the opinion request, we find that the Director of Public Welfare states that it is the intention and belief that only those persons which have been admitted and isolated by the governing body of Koch Hospital are to participate under the Appropriation Act. This being the case, it is our view that so long as the City of St. Louis conforms to the provisions of Article 2, Chapter 126, then the persons who are being treated as tuberculosis patients are entitled to participate as recipients for the sum of \$12.50 per week per patient, and we say this even though such patients are

not physically within the walls of the Koch Hospital, for the tuberculosis patients have no control over the difficulties that confront the governing body of the Koch Hospital and the City of St. Louis.

Assuming for the purpose of argument that one ruled that the word "therein" as contained in Section 7 of the Appropriation Act as well as said word is contained in Section 15181, supra, and that the words "and hospital numbers of charity patients in such hospital * *" also contained in said section, were to be literally construed to mean that such patients had to be physically within the walls of such institution, then one would conclude that if the hospital should become destroyed or incapable of use, that such persons who were under treatment and observation for the disease of tuberculosis, as well as the City of St. Louis, would be precluded from the benefits of the appropriation as set forth in Section 7 of the Appropriation Act of 1943, supra, or, if the city, in the management and control of the Koch Hospital for the benefit of certain patients, then in that event the patients would be said not to be in such hospital. It is our view that this would be an absurd construction to be placed upon both the appropriation act and the Section 15181. We say this for the reason that the appropriation made by the Legislature is in itself a gift of public money from the State and for the purpose of benefiting primarily those persons who are unfortunate in having contracted the disease of tuberculosis, and further to benefit the public in that when said persons are placed in a state of isolation they do not subject those persons with whom they might come in contact otherwise if they were not provided with adequate facilities of hospitals.

Therefore, when we consider the constitutional prohibition together with the ruling of the Court in the Seibert case, it is our view that Section 7 should be given a construction more favorable to the recipients of said money, namely, those persons afflicted with the disease of tuberculosis rather than a very strict construction, which construction might challenge the constitutionality of the Appropriation Act and thereby preclude the indigent recipients from benefiting by the appropriation when such recipients, in truth and fact have no control over how they were being treated, and when in truth and fact such recipients are without question entitled to have the benefits of the appropriation of the character provided for in Section 7 of the Appropriation Act. The expenditure of public money of such class of persons is unquestionably for a public purpose even though such persons are cared for outside a state institution for the purpose of tubercular patients. (See the Seibert case, supra)

CONCLUSION

It is the opinion of this department that Section 7 of the Appropriation Act of 1943, Laws of 1943, pages 22 and 23, as well as Section 15181, Article 2, Chapter 126, R. S. Mo. 1939, shall be construed to mean that all persons who are admitted to the Koch Hospital and who are receiving the medical care afforded by the hospital, the hospital facilities, and are receiving treatment common to all persons admitted to the Koch Hospital, are entitled to the benefits made possible by the \$12.50 weekly payments to be derived from the Appropriation Act, regardless of whether such persons are actually physically within the walls of the Koch Hospital during the particular week in which said sum of \$12.50 is claimed by the Director of the Department of Public Welfare of the City of St. Louis.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

ROY McKittrick
Attorney General

BRC:ML

221 ✓
TOWNSHIP ORGANIZATION: Annual settlement with the county clerk by township trustee required by Section 13967, R. S. Mo. 1939, but audit of the books and accounts of the township trustee by the county clerk is not required by law.

August 22, 1944.

8-24
FILED
16

Hon. G. R. Chamberlin
Attorney at Law
Harrisonville, Mo.

Dear Sir:

Your two letters dated respectively June 8 and July 6, 1944, have been received and are as follows:

"I am enclosing herewith a few references or notations which I have made for the benefit of our County Clerk.

"This County is under Township Organization and it appears that it has been accustomed for the township trustees to purport to make settlement.

"I am unable to find any specific provision for the trustee for each township to come into the County Clerk with their books and accounts for the Clerk to check over what they have to produce.

"In the sections mentioned in the notations herewith, provision for various settlements and for filing a copy of the settlement with the County Clerk.

"In Section 13967 does provide for a settlement which has been done and been made separate and a part of the annual visitations of the township trustees.

"I would appreciate the benefit of your opinion on the question of any provision for the trustees to bring their books and accounts in before the County Clerk to go over the same with him.

"If this is not required it is certainly an unnecessary burden upon the Clerk.

"Thanking you for this valuable information, I remain"

August 22, 1944.

"I would like to have your valued opinion on the matter of reports which the Township Boards in Counties, under Township Organization made to the County Clerk, or Court. There are several provisions made in making reports to the County Clerk etc., but in this County it seems to have grown to be a custom of each Township Clerk to come in and make a 'settlement' with the County Clerk.

"This takes a lot of time and since this settlement which they make is in no sense an audit, and I do not find any provision of the County Clerk to audit the books of the Township Clerk, except the Statutory provision for the School Money reports and a report to the County Court.

"I would appreciate your opinion and outline on this matter.

"I wrote your office about this some time ago and in some inadvertent way, it was written on my Attorney at Law stationery, it was written as Prosecuting Attorney of this County.

"Thanking you, I remain"

Your letters request an opinion from this department on the questions;

First: Whether the township trustee of a township in a county under township organization shall make an annual settlement with the county clerk of such county, and whether the county clerk shall make an audit of the books and accounts of such township trustee, and;

Second: Whether the clerk of such township in a county under township organization shall make a settlement with the county clerk at any time.

Section 13944, Article 4, Chapter 101, R. S. Mo. 1939, provides for a biennial election on the last Tuesday of March for township officers. Section 13945 of the same article and chapter designates the title and number of township officers to be chosen at such biennial elections, including one trustee in such township, who shall be ex officio treasurer of the township. Said section is as follows:

"There shall be chosen at the biennial election in each township one trustee, who shall be ex officio treasurer of the township, one township collector, and one township clerk, who shall be ex officio township assessor, one constable, two members of the board, and two justices of the peace: Provided, the same persons may be elected members of the board and justices of the peace, at the same election, and hold both offices; also the same person may be elected constable and collector at the same election and hold both offices at the same time, by taking the proper oath of each office and giving the bond required by law."

Section 13965, Article 7, Chapter 101, R. S. Mo. 1939, requires the township trustee and ex officio treasurer to receive and pay over all moneys raised therein for defraying township expenses. Said section is as follows:

"The township trustee and ex officio treasurer of each township shall receive and pay over all moneys raised therein for defraying township expenses: Provided, that before entering on the duties of his office he shall execute such bond as is required in section 13956; and in case of default, it is hereby made the duty of the township clerk to institute suit thereon, in the name of the township, in any court of competent jurisdiction."

Section 13967, Article 7, Chapter 101, R. S. Mo. 1939, commands the township trustee and ex officio treasurer to keep a complete account and identification of all moneys officially received and disbursed by him in an official record book, and points out the manner in which said record shall be kept respecting each school district and road money belonging to the township.

Then said section proceeds to say that he shall make settlement annually between the 20th day of March and the 15th day of April with the county clerk of all moneys received by him on account of schools, showing how the same have been disbursed, and he shall settle with the county treasurer within 20 days after the apportionment of the school funds to the school district and receive all moneys in the hands of the county treasurer belonging to his township and receipt for the same.

Said section, insofar as it relates to the duties of a township trustee, is as follows:

"He shall keep a correct account of all moneys coming into his hands by virtue of his office, from what source received, and what amount, of

the amount paid out, to whom paid, and on what account, in a book to be kept by him and provided for the purpose by the township; said book to be kept in such a manner as to show the amount of money in his hands belonging to each school district or fractional part in the township and the amount of road money belonging to the township. He shall make settlement annually between the twentieth day of March and the fifteenth day of April with the county clerk of all moneys received by him on account of schools, showing how the same have been disbursed, and he shall settle with the county treasurer within twenty days after the apportionment of the school funds to the school district, and receive all money in the hands of the county treasurer belonging to his township, and receipt for the same, * * *."

The above quoted section does not provide for an audit of the books and accounts of the township trustee, nor is an audit required by any other section of the township organization chapter.

Section 13967 designates precisely what subjects shall be covered in the settlement between the 20th day of March and the 15th day of April of each year between the township trustee and the county clerk. There is no provision made in this section or elsewhere in the township organization plan, as contained in Chapter 101, for a settlement of the other or general accounts of the township trustee with the county clerk. Neither is there found any authority in said chapter for the county clerk to audit the books or accounts of the township trustee. Section 13965, R. S. Mo. 1939, safeguards the moneys coming into the hands of the township trustee by requiring him, before entering on the duties of his office, to execute such bond as is required in section 13956.

Thus, it would appear that the legislature did not contemplate that an audit of the books and accounts of a township trustee should be needed, in view of the requirements for an adequate bond. At least the legislature did not make provision for any such audit.

The duties of the township clerk of a township under township organization are prescribed by Article 8, Chapter 101, R. S. Mo. 1939, consisting of six sections, to wit: 13970 to 13975, inclusive.

It will be observed by careful reading of those sections that there is no provision whatsoever made in any of them requiring the township clerk to make any settlement at any time with the county clerk.

Conclusion

It is therefore the opinion of this department that the township trustee under the terms of Section 13967, R. S. Mo. 1939, is required to make settlements annually between the 20th day of March and the 15th day of April with the county clerk of all moneys received by him on account of schools, showing how the same have been disbursed, and that he shall settle with the county treasurer within 20 days after the apportionment of the school funds to the school and receive all money in the treasury belonging to his township, and receipt for same, but that such township trustee is not required by any section or article, contained in Chapter 101, R. S. Mo. 1939, on township organization, to make any general settlement of his books or accounts with the county clerk, nor is it required in any part of the said township organization chapter that the accounts or books of the township trustee be presented to the county clerk for an audit thereof, nor that the county clerk shall audit the same.

It is the further opinion of this department that the township clerk of a township in a county in Missouri under township organization is not required by Chapter 101, R. S. Mo. 1939, to make any settlement annual or otherwise with the county clerk of such county.

Respectfully submitted,

EDGAR B. WOOLFOLK,
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

EBW.sc
GWC.

CONFEDERATE HOME: In the event of failure of Legislature to comply with terms of deed and statute in maintaining Home and its inmates, State's title cannot be divested without consent of Legislature.

September 20, 1944

FILE

16

9/26

Dr. Charlton F. Chute
Director of Research
Legislative Research Committee
Jefferson City, Missouri

Dear Sir:

Recently you submitted the following request for the opinion of this department:

"Is the State of Missouri legally obligated to maintain the Confederate Home at Higginsville until the last of the inmates dies or could the present inmates (ten in number) be transferred and supported in some other state or private institution or home?

"Statutes covering this question are found in the Revised Statutes of Missouri, 1939, Chapter 124, Article I, and the session laws of 1943, page 953. We are also enclosing a copy of the deed conveying the Confederate Home from the Executive Committee to the State of Missouri."

The transfer of the Confederate Home and its lands to the State of Missouri was effected by a deed dated March 16, 1897, by the governing body of the Confederate Home of Missouri, a corporation:

" * * * in consideration of the assumption of The State of Missouri of the Maintenance and support of said Confederate Home for the term of twenty years or so long as it shall be needed for the main-

tainance and care of infirm and dependent ex-confederate soldiers and sailors, their wives, widows and orphans, all as contemplated and provided in the aforesaid act of the Legislature of Missouri, approved March first 1897, convey, grant, bargain and sell, in fee simple forever unto the said State of Missouri, the following described tracts or parcels of land situate in Lafayette County, State of Missouri, near the town of Higginsville, Missouri, known as the Confederate Home of Missouri, * * *."

The authority for this transfer is found in the Act of March 1, 1897 (Laws of 1897, page 26). The pertinent portions of the Act are:

"Section 1. That the institution known as the confederate home, which is situated near Higginsville, in the county of Lafayette, in the state of Missouri, is hereby declared to be an eleemosynary institution of the state of Missouri, in which infirm and dependent ex-confederate soldiers and sailors, their wives, widows and orphans may be maintained and cared for.

"Sec. 2. That the purpose of this act is that the state shall assume, and does hereby assume, the maintenance and support of said confederate home for the term of twenty years, or so long as shall be needed for the purpose of section 1. In consideration of this action upon the part of the state, the present executive committee of said confederate home shall convey to the state of Missouri all the property of said confederate home now owned and held by it under its corporate franchise procured from the state under article X, chapter 42, Revised Statutes of Missouri, 1889, consisting of three hundred and sixty two and

86.100 acres of land, more or less, near Higginsville, Lafayette county, Missouri, except two and eighty-six one hundredths (2 86/100) acres for cemetery lot, together with all improvements thereon, and all personal property now at said home, and the deed therefor, after being duly recorded, shall be deposited with the secretary of state."

In 1943 the Board of Trustees of the Confederate Home was abolished and the custody of the Home's property, its affairs and management was vested in the Board of Managers of the State Eleemosynary Institutions (Laws of 1943, pages 953-955, inclusive). The State's undertaking to maintain the Confederate Home and its inmates was again affirmed, as attested by the following language:

" * * * The said Board of Managers of the State Eleemosynary Institutions shall continue to maintain the Confederate Home and Memorial Park at Higginsville for the purpose for which it was established so long as it shall be needed for the maintenance and care of infirm and dependent ex-confederate soldiers and sailors, their wives, widows and orphans." (Section 15129, Laws of 1943, page 954.)

The request, then, may be stated in the following vein: In the event the obligation or undertaking to maintain the Home and its inmates might be disregarded by the Legislature, either by transferring the inmates to some other institution and the Home's use changed by appropriate statutes, or by a failure or refusal to appropriate sufficient funds, would the Home and its property be lost to the State of Missouri?

The obligation to maintain the Home still exists (Section 15129, Laws of 1943, page 954). In this connection, however, it is noted that the Board of Managers of the Eleemosynary Institutions does not have title to the property, but only custody; title and ownership being in the State of Missouri; and that the undertaking to main-

tain the Home exists by legislative enactment and not by virtue of any contract or agreement of the Board of Managers of the State Eleemosynary Institutions. This difference is emphasized by the rules of law to the effect that while the Eleemosynary Board may be sued upon its contracts (Jones v. White, 77 S. W. (2d) 603, 1. c. 608), the State may not be sued without its consent (Nacy v. LePage, 341 Mo. 1039, 111 S. W. (2d) 25; Zoll v. St. Louis County, 345 Mo. 1031, 124 S. W. (2d) 1188). The State of Missouri has never consented that it be sued.

The answer to the question, we believe, does not pivot upon whether a conveyance may be forfeited when the deed does not contain a provision for such forfeiture (Choteau v. City of St. Louis, 331 Mo. 781, 55 S. W. (2d) 299), or whether the transfer of land may be set aside for partial failure of consideration (Lewis v. Brubaker, 14 S. W. (2d) 982, 1. c. 988). As the State has for some years maintained the Home and its inmates, the solution, we believe, turns upon the power to divest the State of title without legislative sanction. The divestment could come about solely by judicial procedure absent legislative consent.

It is a truism that under our separation of powers doctrine the three branches of government are separate and independent, and that the judiciary may not control the actions of the other divisions. (State ex rel. Major v. Shields, 272 Mo. 342; 16 C. J. S., Secs. 104, 106; In the matter of State of New York, 65 L. Ed. 1057; Cunningham v. Railroad Co., 27 L. Ed. 992.)

In the last cited case the Supreme Court of the United States used the following language, 1. c. 996:

"No foreclosure suit can be sustained without the State, because she has the legal title to the property, and a purchaser under a foreclosure decree would get no title in the absence of the State. The State is in the actual possession of the property, and the court can deliver no possession to the purchaser. The entire interest, adverse to plaintiff, in this suit, is the interest of the State of Georgia in the property, of which she

has both the title and possession.

"On the hypothesis that the foreclosure by the Governor was valid, the trust asserted by plaintiff is vested in the State as trustee, and not in any of the officers sued.

"No money decree can be rendered against the State, nor against its officers, nor any decree against the Treasurer, as settled in Louisiana v. Jumel.

"If any branch of the State Government has power to give plaintiff relief it is the legislative. Why is it not sued as a body, or its members by mandamus to compel them to provide means to pay the State's indorsement?

"The absurdity of this proposition shows the impossibility of compelling a State to pay its debts by judicial process."

This department should not be understood as in any manner sanctioning, directly or indirectly, the noncompliance with an undertaking. Neither does it desire to offer gratuitous suggestions to the General Assembly upon questions of public policy. The department concerns itself solely with the legal question presented by the request.

CONCLUSION

It is the opinion of this department that in the event the State of Missouri, through its General Assembly, did not satisfy the undertaking or obligation to maintain the Confederate Home at Higginsville and its inmates according to the terms provided by the conveyance of the Home

Dr. Charlton F. Chute

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September 20, 1944

and the applicable statutes, title to the property could not be divested from the State of Missouri without legislative sanction.

Respectfully submitted

VANE C. THURLO
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
Acting Attorney General

VCT:HR

SCHOOL DISTRICTS: School Board has no power to spend district's money for public road purposes.

October 13, 1944

FILE

16

10/16

Honorable C. R. Chamberlin
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Sir:

We have your request of September 23, 1944, for an opinion from this department, which request is as follows:

"I have many persistent inquiries wanting to know if a school district can use the money out of its general fund for the purpose of public roads.

"The theory of this request is that roads are needed to get the children to school, and a great many of the school districts are appropriating money out of its general fund to road building.

"I find no provision for this, and would be glad to have your most valued opinion about this matter."

In the decision of State v. School District of Kansas City, 62 S.W. (2d) 813, 1.c. 816, this principle is enunciated:

"It is obvious that article VI of the charter furnishes no basis for an assessment of special benefits against public school property. All the way through it speaks of and authorizes only special assessments against private property. Land owned and used for public school purposes is not private property, but strictly public property. This was expressly decided by this court in banc in City of Edina to Use of Pioneer Trust Co. v. School District, 305 Mo. 452, 267 S.W. 112, 36 A.L.R. 1532, 1540, note. It had been so considered in earlier Missouri cases. In City of Clinton to Use of

Thornton v. Henry County, 115 Mo. 557, 568, 569, 22 S.W. 494, 495, 496, 37 Am. St. Rep. 415, referring to Abercrombie v. Ely, 60 Mo. 23, this court said: 'The effort in that cause was to enforce a mechanic's lien against a schoolhouse, which was public property.' And further on the opinion said: 'In the first place, property owned by a county or other municipal corporation, and used for public purposes, cannot be sold on execution. * * * Hence it has been held that a schoolhouse cannot be sold under a judgment against the board of education,' citing State, to Use of Board of Education, v. Tiedemann, 69 Mo. 306, 33 Am. Rep. 498. What is said in Thogmartin v. Nevada School District, 189 Mo. App. 10, 176 S.W. 472, cited by relator here, does not militate against this view, but accords with it."

Again, we quote the paragraph from the opinion, l.c. 817, which throws light upon our question here:

"We are not to be understood as attempting to pass judgment on the meaning of any of the sections of the Kansas City charter mentioned in this opinion, other than those directly involved in this case. What we do say is that, if the framers thereof had intended that all the land owned by all the public or quasi public entities mentioned in section 319 should be liable to special assessment for any and all public improvements authorized by the charter, they could and certainly would have said so in clear, plain terms; and it seems they would have put the provision in that part of the charter defining the general powers of the city, rather than to have stated it in vague language in an isolated section dealing with 'Public Improvements.' It is extremely improbable they would have provided in article VI that special benefit assessments in condemnation proceedings should be made against private property, if they had meant by section 319 that all property, whether public or private, should be subject to assessment for that and all other public improvement purposes. At least it can be asserted with positiveness, and we so hold, that neither the general provisions of sections 1 and 3 of article I

nor the ambiguous provisions of section 319 are sufficient to overcome the explicit limitations imposed by article VI. Public property belonging to a county, city, or school district will not be held liable to special assessment for public improvements, unless it is made so by express enactment or clear implication. City of Clinton, to Use of Thornton v. Henry County, supra, 115 Mo. loc. cit. 567, 22 S.W. 494, loc. cit. 495, 37 Am. St. Rep. 415; City of St. Louis v. Brown, 155 Mo. 545, 561, 56 S.W. 298, 301; Barber Asphalt Paving Co. v. St. Joseph, 183 Mo. 451, 457, 82 S.W. 64, 65; City of Edina to Use of Pioneer Trust Co. v. School District, supra, 305 Mo. loc. cit. 461, 462, 267 S.W. 112, loc. cit. 115, 36 A.L.R. 1532."

In the case of Normandy Consol. School Dist. v. Wellston Sewer Dist., 77 S.W. (2d) 477, l.c. 480, par. 6, the court said:

"As we view the case at bar, it is not to be distinguished from the cases heretofore cited in the matter of the necessity for express legislative mention of public property as a condition to its being held subject to special assessment; and inasmuch as the sewer law in question neither by express enactment nor by clear implication manifested a legislative intent that school property should be liable to the imposition of the taxes provided for therein, it follows that the taxes assessed against the property of plaintiff school district must be held to have been assessed without authority of law, and for such reason to be null and void."

From the reading of the cases, supra, we find that the courts have unanimously held that public property belonging to a county, city, or school district will not be held liable to special assessment for public improvements, unless it is made so by express enactment or clear implication of the statutes.

We wish to further call attention to the case In Re Farmers' & Merchants' Bank of Chillicothe, 63 S.W. (2d) 829, l.c. 830, pars. 1 and 2, wherein the court said:

"The school district did not have power to sell its property or authority to dispose of its public revenue save in the manner provided in chapter 57, R.S. Mo. 1929 (section 9194 et. seq. (Mo. St. Ann. Sec. 9194 et. seq., p. 7066)).
* * * *"

In the case of Corley v. Montgomery, 46 S.W. (2d) 283, 1.c. 286, pars. 8 and 9, the court said:

"Plaintiffs urge that public officers, such as the members of the school board, are creatures of the law, whose duties are fully provided for by statute; that in a way they are agents, but they are never general agents, in the sense that they are hampered neither by custom nor law, nor are they absolutely free to follow their own volition, citing Lamar Township v. City of Lamar, 261 Mo. 171, 189, 169 S.W. 12 Ann. Cas. 1916D, 740. We do not question the accuracy of the above general statement, nor do we mean to go contrary to it. No doubt, if the board attempts to do something they are not authorized to do, or if, being authorized to do certain things under certain circumstances, they seek to do something outside of or beyond those circumstances, or which, as a matter of law, or unquestionably, are injurious to the public welfare and violative of their public duties, they can be controlled and directed into proper action by the appropriate suit. * * * *"

We do not find any section in the statutes which specifically gives a school district the authority to use money out of its general fund for the purpose of making donations to the building of roads. On the contrary, the Constitution of Missouri, as well as the Legislature, has seen fit to set up divers methods for the maintenance of roads in the state of Missouri.

CONCLUSION.

It is the opinion of this department that the Board of

October 13, 1944

Directors of a school district cannot use the money out of the school district's general fund for the purpose of building or improving public roads, even though such children from the district traverse the road to and from school.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
Acting Attorney General

BRG:ml

ELECTIONS.

: Declaration of Candidacy required
: by Sec. 11550 R. S. Mo., 1939,
: may be signed and filed by *only duly*
: authorized agent.

May 1, 1944

Honorable W. Coe
County Clerk of Atchison County
Rock Port, Missouri

5/9
FILED
18

Dear Mr. Coe:

This will acknowledge receipt of your letter of April 26, 1944, in which you request an opinion from this office. The text of such letter is as follows:

"Please give me your opinion, at once, upon the following question relating to the coming Primary Election.

"Walter L. Mulvania is a citizen and qualified elector of Atchison county, Missouri.

"He is now, and for a long time has been, a soldier in the United States Army, now stationed at Camp Atterbury, Indiana.

"Said W. L. Mulvania on April 25, 1944, sent the following Western Union Telegram to H. P. Savage, a citizen of this city:

'Camp Atterbury, Ind. 819 A. M., April 25th. 1944.
H. P. Savage
Rock Port, Mo.

'You are authorized to file my candidacy for Prosecuting Attorney Atchison County, Missouri consult my father.

Walter L. Mulvania.'

"Said H. P. Savage on April 25th, 1944, signed the name 'W. L. Mulvania' to Candidate's Declaration, in usual form, and filed the same with above telegram, with me as County Clerk on said date, the declaration being as follows:

"CANDIDATE'S DECLARATION

"I, the undersigned, a resident and qualified elector of Clay Township, City of Rock Port, County of Atchison, and State of Missouri, do announce

May 1, 1944

myself a candidate for the office of County Attorney on the Democrat ticket, to be voted for at the primary election to be held on the first Tuesday in August, 1944, and I further declare that if nominated and elected to such office I will qualify.

W. L. Mulvania.'

"Question: Is this a proper filing of a candidate for office under Section 11550, R. S. 1939, so as to entitled said candidates name to be placed on the ticket for the coming Primary Election?"

Section 11550, R. S. Mo., 1939, provides:

"The name of no candidate shall be printed upon any official ballot at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate, as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify; and such declaration shall be in substantially the following form:

"I, the undersigned, a resident and qualified elector of the (_____ precinct of the town of _____), or the _____ precinct of the _____ ward of the city of _____, county of _____ and state of Missouri, do announce myself a candidate for the office of _____ on the _____ ticket, to be voted for at the primary election to be held on the first Tuesday in August, _____ and I further declare that if nominated and elected to such office I will qualify.

(Signed) _____."

Section 11553 R. S. Mo., 1939, provides:

"No person shall file more than one written declaration indicating the party designation under which his name is to be printed on the official ballot, and all declaration papers shall be filed as follows:

May 1, 1944

"1. For state officers, representatives in congress, courts of appeals and circuit judges, and those members of the senate and assembly whose districts comprise more than one county, in the office of the secretary of state.

"2. For officers to be voted for wholly within one county or in the city of St. Louis, in the office of the county clerk of such county or the office of the election commissioners of the city of St. Louis. (R.S. 1929, Sec. 10260.)

These are the two sections relative to the filing of declarations of candidacy, section 11550 above quoted provides "A written declaration shall have been filed by the candidate as provided in this article. Section 11553 provides that where the office is to be voted on wholly within one county, the declaration shall be filed in the office of the County Clerk. Thus we see that there is no specific provision either that the candidate be present at the time of filing or that he sign the declaration himself. The next question is: Is the personal signature of the candidate on the declaration so essential that it must be implied from the sections above quoted, or could such declaration legally be filed and signed by a duly authorized agent? It should be noted that this state has no requirement that the declaration contain any affidavit or that it be verified. All the declaration contains is the statement that a particular person intends to run for certain office and that if nominated and elected, he will qualify. It is submitted that this information is not so essentially personal that it could not be given by a duly authorized agent such as you have here.

In 2 Am. Jur. Sec. 22, it is stated:

"A person may properly appoint an agent to do the same acts and to achieve the same legal consequences by the performance of an act as if he had himself personally acted unless public policy or the agreement with the principal requires personal performance."

In 2 C. J. p. 431, "So also there are many acts regulated by statute which because of their nature or the requirements of the statute must be done personally and cannot be delegated, but it has been held that unless the intention is plainly apparent from the

Hon. Loren W. Coe

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statute the authority may be delegated, the courts applying the maxim "Qui facit per alium facit per se." Citing Finnegan v. Lacy 32 N. E. 656; Webster v. Brown 38 Ill. 87; White v. Holliday, 11 Tex., 606; In re proxy Incorporation 43 Pa. Co. 613.

There is certainly no declaration in the statutes of this state, or the expression of an intention that the act of filing the declaration of candidacy must be performed personally and cannot be done by a duly authorized agent.

In State v. Dye, 163 S. W. (2d) 1. c. 1057, a candidate had filed and signed declarations for five other candidates. The court held that he had a right to do so either if duly authorized or if the other parties ratified his act in so doing. The court stated at page 1057, "Did he have authority and did he act within the scope of his authority in signing said declarations for the others? We think under the uncontradicted facts in this case that he did have authority or that at least, the other relators ratified his acts in so signing their names to said declarations."

CONCLUSION.

It is therefore the opinion of this office that the declaration of candidacy required to be filed by Sec. 11550 R. S. Mo., 1939, may be signed and filed by a duly authorized agent.

Respectfully submitted

ROBERT J. FLANAGAN
Assistant Attorney General

APPROVED:

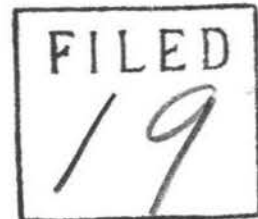
ROY MCKITTRICK
Attorney General

RJF:LeC

TAXATION AND REVENUE:

Tax deed conveying land of army inductee should not be made and delivered until after full compliance with Soldiers' and Sailors' Relief Act.

March 8, 1944



Honorable Maurice W. Covert
Prosecuting Attorney
Texas County
Houston, Missouri

Dear Mr. Covert:

This is an acknowledgment of your opinion request to the General, relating to the Jones-Munger Law, and Soldiers' and Sailors' Relief Act, which is as follows:

"This county has township organization and the treasurer who is also ex-officio collector of the back taxes has a problem which I am not sure about the legal rights involved. I am therefore submitting it to you with a request for your opinion.

"A tract of land originally belonged to Ida Davis who died a couple of years ago. While she was living she placed a mortgage on this land this mortgage was foreclosed in January, 1942 and the Trustee's Deed was made to Lynn Davis. This Lynn Davis was Ida Davis' nephew and as she had no direct heirs he was one of her heirs at the time she died. He entered the Army in November, 1942 and has been outside of the United States in his military service. The Trustee's Deed to Lynn Davis was never recorded and he never filed with the treasurer and ex-officio collector the affidavit required by the statutes to prove that he was in military service, however, he is well known here at Houston and is known by everyone to be in the military service and is known to be Ida Davis' heir, all this in addition to being the purchaser in the trustees

sale although that deed has never been placed on record.

"The first of this month this land was sold at third sale to a man who lives here at Houston and now demands a deed from the collector. The collector feels that he should not make this deed knowing the above facts to exist. He had made no particular investigation of this tract of land until after the land was sold at third sale, but all of these facts have been called to his attention since then. We are asking that based on these facts what your opinion would be as to the collector's duty in this connection. Please send me a extra copy of this opinion for delivery to our collector."

Section 11130, R. S. Mo., 1939, is in part as follows:

"Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell same to the highest bidder, and there shall be no period of redemption from such sales. No certificate of purchase shall issue as to such sales but the purchaser at such sales shall be entitled to the immediate issuance and delivery of a collector's deed.***"

Therefore such sale is final unless the consideration is so grossly inadequate as to amount to fraud or, unless such sale is subject to the provisions of the Soldiers' and Sailors' Civil Relief Act.

In regard to the sale of land for delinquent taxes, for a grossly inadequate consideration, the Supreme Court, in the case of J. C. Nichols Insurance Co. v. Roorbach, 162 S. W. 2d. 274-5, held:

"On the merits the only question presented for consideration is whether the deed should be set aside and title decreed in the plaintiff solely on the ground that the \$40 paid by Roorbach for the lot "is so grossly inadequate as of itself alone to amount to a fraud".

"The identical question has been ruled by the court en banc in Bussen Realty Co. v. Benson et al., Mo.Sup., 159S.W.2d 813, 814. In that case we considered the questions presented by the defendants in the instant case and ruled that a consideration of \$11 for real estate of the value of \$2,000 was "so grossly inadequate as of itself alone to amount to a fraud". Likewise, we think that a consideration of \$40 for a lot of the value of \$1,000 "is so grossly inadequate as of itself alone to amount to a fraud".

Section 510, Art. 1 of the Soldiers' and Sailors' Relief Act, 50 U.S.C.A. Appendix, was involved in a decision of the Supreme Court of Arkansas in relation to a matter of taxes on real estate. Therein the court, in the case of Reynolds v. Haulcroft, 170 S.W. 2d 678, 679 held:

"It is undisputed in this case that appellant, James W. Reynolds, was a sailor in the service of the Navy of the United States at the time this action was instituted in the lower court, and was not present during any of the proceedings leading up to the decree and was not present when the decree was entered.

"The record discloses that appellant objected to, and sought to stay, all proceedings in the lower court during his absence in his country's service, in accordance with the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, supra. Such was the effect of appellant's pleadings.

"After a careful review of the record before us, we think the trial court abused its discretion in denying to appellant, James W. Reynolds, the stay prayed. The Congress of the United States declared the purpose of the Soldiers' and Sailors' Civil Relief Act to be, 50 U.S.C.A. Appendix Section 510: "In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force."

In the same case the court, in defining the purpose of such act, held:

"Commenting upon this section, the New York Supreme Court in *Hunt v. Jacobson et al.*, February 10, 1942, 178 Misc. 201, 33 N.Y.S.2d 661, 664, said: "The purpose of such enactments is to relieve a person so engaged in military service from the mental distress occasioned by the handicap of his being in the military service, resulting in his inability to function with the freedom of action which he possessed prior to his induction

into the military establishment, causing inability to meet financial and other obligations and commitments, the mental distress resulting from inability to adequately protect legal rights and interests or to make proper defense to suit brought against him, it being recognized that such distress has the tendency to impair his efficiency as a member of the militia, and, as well, the tendency to impair the efficiency of the organization with which he may be associated;--the design was 'to prevent interference with military duties! Andrews v. Gardiner, supra (185 App.Div. 477, 173N.Y.S. (1), 2)."

Section 520 of the Soldiers' and Sailors' Relief Act is as follows:

" (1) In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application

make such appointment. Unless it appears that the defendant is not in such service the court may require, as a condition before judgment is entered, that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this Act.

" (2) Any person who shall make or use an affidavit required under this section, knowing it to be false, shall be guilty of a misdemeanor and shall be punishable by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both.

" (3) In any action or proceeding in which a person in military service is a party if such party does not personally appear therein or is not represented by an authorized attorney, the court may appoint an attorney to represent him; and in such case a like bond may be required and an order made to protect the rights of such person. But no attorney appointed under this Act to protect a person in military service shall have power to waive any right of the person for whom he is appointed or bind him by his acts.

" (4) If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal

representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment." (Under-scoring ours.)

Section 521 thereof is as follows:

"At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

Section 560 thereof is as follows:

" (1) The provisions of this section shall apply when any taxes or assessments, whether general or special (other than taxes on income), whether falling due prior to or during the period of military service, in respect of personal property, money, or credits, or real property owned and occupied for dwelling, professional, business, or agricultural purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

" (2) No sale of such property shall be made to enforce the collection of such tax or

assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon application made therefor by the collector of taxes or other officer whose duty it is to enforce the collection of taxes or assessments. The court thereupon, unless in its opinion the ability of the person in military service to pay such taxes or assessments is not materially affected by reason of such service, may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the period of military service of such person.

" (3) When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in military service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than six months after the date when this Act ceases to be in force; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption.

" (4) Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of 6 per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon."

Section 590 thereof is as follows:

" (1) A person may, at any time during his period of military service or within six months thereafter, apply to a court for relief in respect of any obligation or liability incurred by such person prior to his period of military service or in respect of any tax or assessment whether falling due prior to or during his period of military service. The court, after appropriate notice and hearing, unless in its opinion the ability of the applicant to comply with the terms of such obligation or liability or to pay such tax or assessment has not been materially affected by reason of his military service, may grant the following relief:

" (a) In the case of an obligation payable under its terms in installments under a contract for the purchase of real estate, or secured by a mortgage or other instrument in the nature of a mortgage upon real estate, a stay of the enforcement of such obligation during the applicant's period of military service and, from the date of termination of such period of military service or from the date of application if made after such service, for a period equal to the period of the remaining life of the installment contract or other instrument plus a period of time equal to the period of military service of the applicant, or any part of such combined period, subject to payment of the balance of principal and accumulated interest due and unpaid at the date of termination of the period of military service

or from the date of application, as the case may be, in equal installments during such combined period at such rate of interest on the unpaid balance as is prescribed in such contract, or other instrument evidencing the obligation, for installments paid when due, and subject to such other terms as may be just.

" (b) In the case of any other obligation, liability, tax or assessment, a stay of the enforcement thereof during the applicant's period of military service and, from the date of termination of such period of military service or from the date of application if made after such service, for a period of time equal to the period of military service of the applicant or any part of such period, subject to payment of the balance of principal and accumulated interest due and unpaid at the date of termination of such period of military service or the date of application, as the case may be, in equal periodic installments during such extended period at such rate of interest as may be prescribed for such obligation, liability, tax, or assessment, if paid when due, and subject to such other terms as may be just.

" (2) When any court has granted a stay as provided in this section no fine or penalty shall accrue during the period the terms and conditions of such stay are complied with by reason of failure to comply with the terms or conditions of the obligation, liability, tax, or assessment in respect of which such stay was granted."

The above decision is based upon a tax collection under court procedure and not by summary action similar to that provided in the Jones-Munger law.

The above act contains provisions of the Soldiers' and Sailors' Relief Act of 1918. In construing the right

of a soldier or sailor under the 1918 Act with reference to taxes enforced in a summary manner, in 12 Illinois Law Review 453 we find the following statement:

"This bill in addition to reposing in the courts a discretion to grant a stay of any action or execution at any stage, deals also specifically with contracts which impose a continuing liability upon a soldier or sailor during his term of service. These include such contracts as those for policies of insurance, rent for dwellings, interest on mortgages on property used for dwelling or business purposes by the soldier or sailor or his dependents, and purchase of real or personal property by installment contracts calling for the payment of installments during the period of military service; and the same principle is applied to liability for taxes on property. In these cases the creditor is generally given by the terms of the contract the right to exercise certain remedies without the intervention of a court; but this bill prohibits or restrains the exercise of such remedies and preserves intact for the time being, as far as possible, the rights of the soldier and sailor. This is accomplished mainly by requiring the creditor to exercise all such remedies only by leave of court or to institute an action in court which then becomes subject to the general provisions for stay of action and execution." (Underscoring ours.)

In regard to procedure relating to a summary sale of realty under a deed of trust, in construing the 1918 Act the Supreme Court of Massachusetts in Hoffman v. Charleston Bank, 231 Massachusetts Reports 324, 328-9 said:

"***The section does not forbid the foreclosure of mortgages on property owned by persons in the military service of the United States. What the section does forbid is the foreclosure of such a mortgage under a power of sale (contained in it) "unless (the sale under the power is made)

upon an order of sale previously granted by the court and a return thereto made and approved by the court." Clause 3 of Section 302 was enacted to secure to every person in the military service of the United States who owns property subject to a mortgage within the act the relief to which he is entitled under the act. The defendant has urged against this construction of the section, that if that be the true construction of it the result is that until the termination of the time specified in the act no mortgage can be foreclosed by any mortgage except under an order of court and it cannot be that that was the intention of Congress. We are of opinion that this is the result of the true construction of the act, for in that way alone can a mortgagee be certain that the foreclosure of his mortgage will not be made in violation of the act. We are of opinion, that since this is the result of the true construction of the act, this must be taken to have been the intention of Congress."

The Act of 1940 was a substantial reenactment of that of 1918. The legislative history of the 1918 antecedent of this act shows that judicial discretion conferred on the trial court regarding the stay of proceedings instead of rigid and indiscriminating suspension of civil proceedings was the very heart of the policy of Section 521 supra. *Boone v. Lightner* N. C. 1943, 63 S. Ct. 1223, certiorari granted 63 S. Ct. 770, 318 U. S. 750. Vol. 87-No.17, U. S. Supreme Court Advance Opinions, page 1099.

In a court procedure, under the act an affidavit must be filed before default judgment can be obtained showing that defendant is not in military service. If such affidavit is

not filed no judgment shall be entered "without first securing an order of court".

In a summary action, under the Jones-Munger Law, with such type of statutory process shall the collector have a greater right than the court would have in a plenary action and sell the land without first determining whether the land owner is in military service? The word "action" would certainly comprehend summary actions, as well as plenary actions or proceedings.

Under the provisions of Section 532 of such act, no mortgages or deeds of trust executed by a person in military service may be foreclosed or the property seized for non payment, whether under power of sale, or under a judgment entered upon warrant of attorney to confess judgment therein - except as provided in Section 517 of the act - which exceptions arise from subsequent contractual relations - "unless upon an order previously granted by the court and a return thereto made and approved by the court".

Effective operation of the section is made to hinge almost entirely on the court's discretion just as in Section 520 supra. The section seems to apply only to obligations originating prior to the passage of the act on property owned by persons now in military service at the commencement of such service and still so owned. This brings all the self-help type of mortgages within the protection. The case of Hoffman v. Charleston Bank supra, was based upon the rights of equitable ownership of owners who was in military service. The court held that relief was not limited to mortgaged property used by a sailor or soldier or his dependents for business or dwelling purposes, but include all property owned by a sailor or soldier.

Section 560 supra, which was an amendment, dated October 6, 1942, related only to the property of a special group of soldiers or sailors the status of whose property was as follows:

***real property owned and occupied for dwelling, professional, business, or

agricultural purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid paid."

Under the provision of subsection 2:

"No sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon application made therefor by the collector of taxes or other officer whose duty it is to enforce the collection of taxes or assessments.***"

Under the provision of subsection 3, such property, even when sold under legal procedure, might be redeemed or or an action commenced for such purpose at any time not later than six months after the termination of such service.

In event a soldier or sailor, not being privileged to relief from taxes under the above Section 560, owned realty on which taxes had been assessed, whether falling due prior to or during his period of military service, he might obtain relief under the provisions of Section 590 supra.

The relief granted under the above section might, in the discretion of the court, be granted, by stay during military service, or by order within six months after such service.

Section 532 of said act, and Section 590 thereof, were construed, with reference to a stay in the case of Application of Aber, 40 N.Y.S. 2d.48, in the following language

"Petitioner is, however, entitled to the granting of his motion in so far as it seeks to set aside the notice of sale.

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The 1942 amendment, which took effect after the seizure and before the date fixed for the proposed sale, provides (Section 10, 50 U.S.C.A. Appendix Section 532) that "No sale * * * of property for nonpayment of any sum due under any such obligation (referring to obligations specified in Section 302 (1) as amended in 1942) * * *, whether under a power of sale, under a judgment entered upon warrant of attorney to confess judgment contained therein, or otherwise, shall be valid if made after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 * * * and during the period of military service * * * unless upon an order previously granted by the court and a return thereto made and approved by the court."

"The obligations referred to in the above quotation, under the terms of the 1942 Amendments to Section 302 (1) of the 1940 Act, include petitioner's obligation to the respondent. See Section 9, subd. b. of the 1942 Act. Petitioner, a member of the Enlisted Reserve Corps, has been ordered to report for "military service", within the meaning of Section 106, added by the 1942 Act, 50 U.S.C.A. Appendix Section 516, for "military service" as defined in the 1940 Act, includes "training or education under the supervision of the United States preliminary to induction into the military service."

"It follows that the proposed sale of the car without a court order is unauthorized and would, if consummated, constitute a violation of petitioner's rights under the 1942 statute."

"Petitioner is further entitled, under Section 700 (1) (b), added by the 1942 Act, 50 U.S.C.A. Appendix Section 590, to stay of the enforcement of his obligation to respondent for the period of his

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military service, subject to payment of the balance of principal and accumulated interest due and unpaid at the termination of his military service, in equal periodic installments with appropriate interest as provided for under that section.

"In the event that an application is made to the court for the sale of the car, the court may make such provision as may be just for appropriate credit to petitioner upon his obligation to respondent."

Therefore, it is the opinion of this department that general taxes assessed against the property of parties in military service, who are comprehended by Section 560 supra, whether falling due prior to or during the period of military service, may not be offered for sale and sold by the Collector "except upon leave of court granted upon application made therefor by the Collector."

All other parties in military service, with respect to tax assessments on realty whether falling due prior to or during their period of military service, may obtain relief under the provisions of Section 590 supra. In view of such section the collector should offer such taxed lands for sale, under the provisions of the Jones-Munger law, during such period of military service unless ordered to stay such proceedings by court order.

Respectfully submitted

S. V. MEDLING
Assistant Attorney General

SVM:EH

APPROVED

ROY MCKITTRICK
Attorney-General

HOSPITALS: City ordinance did not provide authority for
MUNICIPALITIES: use of hospital fund in the erection of an addition. If doubt arises out of the use of words employed, it is to be resolved in favor of the public and in favor of limiting the expenditures of the appropriation to the express terms for which it was made.

March 25, 1944



Honorable Howard Couch
City Counselor
Nevada, Missouri

Dear Sir:

We are in receipt of your letter of March 15, 1944, in which you request an opinion from this department. Your letter reads as follows:

"In 1937 the City Council of Nevada adopted Ordinance No. 1782, copies of Sections 1, 2, 3 and 4 of said Ordinance being attached hereto. Sections 5 and 6 of the Ordinance merely set the polling places and named the Judges of the election. Section 7 authorized the City Clerk to prepare and obtain the election supplies.

"Ordinance 1785 of the City of Nevada was the Ordinance finding and declaring the results of the above-mentioned election. The vote on the Proposition was 807 in favor of the Proposition and 190 against it.

"The above Proposition was submitted under what is now Section 7036 R.S. Mo. 1939.

"Previously the City of Nevada had voted \$75,000.00 in bonds to build a hospital and the hospital had been built and a Board of Trustees appointed who are operating the hospital.

"The hospital has now become overcrowded and the hospital Board has accumulated a sum in excess of \$20,000.00 derived from taxes levied under the provisions of the Proposition adopted in the election October 19, 1937. The hospital Board of said City desires to use all or a portion of said money to build an extension or addition to the hospital and to equip it. The question has arisen, however, as to authority of the hospital Board to expend monies derived from taxes levied under provisions of the election held under Ordinance 1782 and also as to the use of any future monies which might be derived from such taxes in constructing an extension or addition to the hospital. I would appreciate it very much if you would advise me as to the legality of the use of tax money so derived by the hospital Board for the building of an addition to the hospital and equipping such addition."

Ordinance No. 1782 provides for a special election for the purpose of levying a tax to pay for the "equipping, operating and maintaining" of a City Hospital. We think it unimportant that the form of ballot states a purpose of "operating and maintaining" a City Hospital, excluding the word "equipping" as it appears in the body of the ordinance. We believe that the words "operating and maintaining" would of necessity carry with them the authority to equip since the hospital could not be operated nor maintained without equipment. The City Hospital has been erected and completed. The question presented now is whether, under Ordinance No. 1782, the Board has the right to expend money of the hospital fund for the construction and erection of an addition to the hospital, or whether they are bound to confine expenditures solely to operation and maintenance of the present hospital.

Section 7036, R. S. Missouri, 1939, reads as follows:

"When one hundred taxpaying voters of any city of the third class in this state shall petition the mayor and council asking that

an annual tax be levied for the establishment, either by purchase or otherwise or leasing, equipping and maintaining a hospital in such city for the care and the treatment of the sick and disabled therein, which said petition shall specify the rate of taxation not to exceed two mills on the dollar annually, such mayor and council shall direct the proper officer of the city to give notice in the next legal notice of the annual election or special election which may be called for the purpose of voting on such question that at such election every voter of the city might vote 'for a ____ mill tax for such hospital purposes,' or 'against a ____ mill tax for hospital purposes,' specifying in such notice the rate of taxation mentioned in said petition, and if two-thirds of the qualified voters voting at such election on said proposition shall vote for such tax the said tax specified in such notice shall be levied and collected in like manner as other general taxes of said city and shall be known as 'hospital fund': Provided, that said tax shall cease in case the legal voters in such city shall so determine by a majority vote at any annual election held therein."

Under this section of the statutes, the City of Nevada, Missouri, can, by a two-thirds vote of the inhabitants, levy an annual tax "for the establishment, either by purchase or otherwise or leasing, equipping and maintaining a hospital in such city for the care and the treatment of the sick and disabled therein, * * *."

In State ex rel. Case v. Wilson, 151 Mo. App. 723, 1. c. 726, the court said:

"Municipal corporations possess only such powers as are granted in express words, or those necessarily incident to or implied in

the powers expressly granted. (City of Independence v. Cleveland, 167 Mo. 384, 67 S. W. 216.) And if there is a fair, reasonable doubt concerning the existence of power in the charter of a city, it will be resolved against the city and the exercise of the power denied. (State v. Butler, 178 Mo. 272, 77 S. W. 560.)

"The object of all interpretation of law is to reach the true intent and meaning of the law-making authority. (Grimes v. Reynolds, 94 Mo. App. 576, 68 S. W. 588.)
* * *"

There can be no question, after reading the above section of the statute, that the City of Nevada has the authority to build or lease and operate a City Hospital. May the power to construct an addition to the already established hospital be implied under Ordinance No. 1782?

The Supreme Court stated in Meyers v. Kansas City et al., 18 S. W. (2d) 900, 1. c. 901:

"The ordinance, No. 55,585, in which proposition 8 appears, contains no grant of power, other than that clearly comprehended within the words employed. There is no room, therefore, for the application of the doctrine of implied powers. This is especially true of a grant of powers to a corporation, municipal or otherwise, and if any doubt arises out of the use of the words employed, it is to be resolved in favor of the public and in limiting the expenditures of the appropriation to the express terms for which it was made. State ex inf. Harvey v. Missouri Athletic Club, 261 Mo. 576, 598, 170 S. W. 904, L. R. A. 1915C, 876, Ann. Cas. 1916D, 931.

"Another general rule in the construction of statutes, applicable as well to municipal ordinances, is that acts of the charac-

ter here under review are to be strictly construed. The limitation upon the use of the appropriation in proposition 8 is such, by reason of its terms, that the invoking of the general rule is not necessary."

The Meyers case was quoted with approval in the case of *Meyering v. Miller, Mayor, et al.*, 51 S. W. (2d) 65, 1. c. 67. In the *Meyering* case there was under consideration an ordinance of the City of St. Louis submitting a bond issue to the voters which set forth the purposes for which the proceeds of the bonds should be used in the following language:

"For the acquisition of land and the construction of additions and extensions and equipment of public hospitals and institutions for the care of delinquents and the indigent tubercular, insane, feebleminded, infirm and sick patients, * * *."

Out of the proceeds of the sale of the bonds so voted, the city proposed to erect an entirely new hospital located more than four miles from existing hospitals, and it was contended that this would be a misappropriation and misapplication of the funds. The court held that the language employed authorized the erection of new and separate hospital units as well as increasing the size of existing hospitals.

The Supreme Court stated in the case of *State ex rel. State Building Commission et al. v. Smith, State Auditor*, 81 S. W. (2d) 613, 1. c. 615:

"There is a well-settled rule applicable to a grant of power to a corporation, municipal or otherwise, recognized in this state, and elsewhere, that if any doubt arises out of the use of words employed, it is to be resolved in favor of the public and in limiting the expenditures of the appropriation to the express terms for which it was made. *Meyer v. Kansas City*, supra. But can it be said to be doubtful as to whether equipment

of the character hereinbefore described comes within the purposes of a bond issue to 'repair, remodel or rebuild public buildings devoted to eleemosynary and penal purposes, and for building additions thereto, and additional buildings where necessary?' We think not. There is nothing in the language used to indicate an intention on the part of the voters to authorize the expenditure of the bond money for the purposes in question, and we accordingly hold that equipment of the character mentioned does not come within the terms of the constitutional amendment. * * *

The Supreme Court stated in the case of City of St. Louis v. Senter Commission Co et al., 85 S. W. (2d) 21, l. c. 24:

" * * * The primary rule of construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent. Meyer v. Miller, 330 Mo. 885, 51 S. W. (2d) 65; Cummins v. Kansas City Public Service Co., 334 Mo. 672, 66 S. W. (2d) 920. This should be done from the words used, if possible, considering the language honestly and faithfully to ascertain its plain and rational meaning and to promote its object and manifest purpose. * * *

In view of the above and foregoing cases, it seems to us impossible to interpret the words "equipping, operating and maintaining" so as to confer authority to construct or erect an addition

Section 7040, R. S. Missouri, 1939, provides:

"The board shall control the expenditures of all moneys collected to the credit of the hospital fund, and the construction, leasing, equipping of such hospital and the grounds and other property real and personal belong-

March 25, 1944

ing to such hospital: Provided, all moneys from taxes, donations and from any other source shall be deposited in the city treasury to the credit of the hospital fund, and drawn upon by the vouchers of the proper officers of such board. The board shall also employ such help, professional and otherwise, as may be necessary to carry out the spirit and intent of sections 7036 to 7043, inclusive, and all such assistants and employees shall serve at the pleasure of the board."

This section gives the board control of the money and authority to supervise the construction, leasing and equipping, and power to operate the hospital, but goes no further as regards providing additions.

If there can be said to be any doubt as to the meaning of the words contained in the ordinance, then under the statement made in State v. Smith, supra, that doubt is to be resolved in favor of the public and in limiting the expenditures of the appropriation to the express terms for which it was made.

CONCLUSION

It is the opinion of this department that the Board of Trustees of the City Hospital of Nevada, Missouri, would have no authority to use funds derived from a tax levied under and in accordance with Bill No. 1937-41, Ordinance No. 1782, in the construction of an addition to the City Hospital.

In the event an addition is added to the hospital, these funds could be used for the purpose of equipping, operating and maintaining the City Hospital, which would include the addition.

Respectfully submitted

APPROVED:

RALPH C. LASHLY
Assistant Attorney General

ROY McKITTRICK
Attorney General

RCL:HR

TAXATION: County Court cannot increase a year's tax levy to produce an amount in excess of 10% of the previous year's levy; how illegally paid tax can be recovered.

January 20, 1944.

FILED

20

Mr. Lieu. Cunningham, Jr.,
Prosecuting Attorney
Camden County,
Camdenton, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of January 3, 1944, as follows:

"The camden County Court and Collector of Camden County have requested me to obtain an opinion from you upon the following matter:

"Camden County being one of the Counties referred to in Amendment No. 2 passed by the voters of this State last year permitting certain counties to increase their levy to an amount not exceeding fifty cents on the one hundred dollar valuation. The County did increase its levy to forty-nine cents plus one cent road and bridge levy which said increase of levy was approved by the State Auditors Office and a large per cent of the taxpayers of the County have paid their taxes based upon that levy.

"The Union Electric Land & Development Company, however, on December 30 forwarded to the Collector of Camden County a check for their taxes which was some \$1894.00 short of the amount stated upon their tax statement. They had reduced the County tax levy to 43.2 cents and based their reduction upon Section 11046, Page 1008, 1943, Laws of Missouri, which Section carried a provision that the County Court cannot order a rate of tax levy that will produce mathematically more than ten per cent in excess of the taxes levied for the previous year.

"The County revenue for 1942 amounted to \$33,681.15. The assessed valuation of that year was \$8,420,288.00. The assessed valuation for the year 1943 is \$8,580,549.00. Their contention was that the maximum increase in the taxes was \$3,368.11 or a total possible County revenue for 1943 of \$37,049.26 which upon the 1943 assessed valuation would provide a levy of approximately .43178 cents and of course is some .068 cents less than the levy made and approved.

"We would appreciate your opinion as to whether they are correct in their contention and also as to whether the statute referred to is or is not repugnant to the Constitutional Amendment. They would also appreciate your opinion as to what can be done in connection with the taxpayers who have already paid their taxes if they are correct in their contention and the levy was erroneously made."

Section 11, Article 10 of the Missouri Constitution, prior to its re-enactment on November 3, 1942 (Laws 1943, p. 1082), fixed maximum county tax levies on the following assessed valuations:

"For county purposes the annual rate on property, in counties having six million dollars or less, shall not, in the aggregate, exceed fifty cents on the hundred dollars valuation; in counties having six million dollars and under ten million dollars, said rate shall not exceed forty cents on the hundred dollars valuation; in counties having ten million dollars and under thirty million dollars, said rate shall not exceed fifty cents on the hundred dollars valuation; and in counties having thirty million dollars or more said rate shall not exceed thirty-five cents on the hundred dollars valuation."

Section 11046 R. S. Mo. 1939, prior to its repeal and re-enactment in 1943 (Laws 1943, p. 1008) provided, in part, as follows:

"* * * the county court shall not have power to order a rate of tax levy on real or personal property for the year 1921 which produce more than ten per cent in excess of the amount produced mathematically, by the rate of levy ordered in 1920, and in no subsequent year may any county court or any officer or officers acting therefor, order a rate of tax levy that will produce mathematically more than ten per cent in excess of the taxes levied for the previous year;* *"

In State ex rel. and to Use of Covington v. Wabash Ry. Co. 3 S.W. (2d) 378 (Mo. Sup.) the court held this limitation to be constitutional, saying (l.c.381):

"It is clearly within the right and authority of the General Assembly to pass laws authorizing counties to exercise the taxing power subject to limitations more confining than those set by the Constitution itself, except in instances where the Constitution gives the taxing authorities in uncontrolled discretion, as was done by section 22 of article 10."

Clearly the maximum levies fixed in Section 11 of Article 10, supra, do not give the county court any such discretion of the character granted in Section 22, Article 10, and the court so ruled.

Now to move on to the present state of the law, Section 11, Article 10 of the Constitution, as re-enacted on November 3, 1942, appears in Laws 1943, p. 1082, and is in part as follows:

"For county purposes the annual rate on property, in counties having thirty million dollars or less, shall not exceed fifty cents on the hundred dollars valuation; and in counties having thirty million dollars or more said rate shall not exceed thirty-five cents on the hundred dollars valuation."

Comparing this language with that which it replaced, it appears that the only change is to alter the brackets from four in number to two and thereby increase the maximum theretofore permitted in counties of less than thirty million assessed valuation.

Section 11046, as re-enacted in Laws 1943, page 1008, provides, in part, as follows:

"* * that (no) county court shall order a rate of tax levy that will produce mathematically more than ten per cent in excess of the taxes levied for the previous year."

(Note: The word "no" in parenthesis has been inserted in this bill by us even though it does not appear in the printed session acts. The enrolled and signed bill on file with the Secretary of State reflects that "no", but it was erroneously omitted from the act as it appears in the 1943 Session Acts.)

If such restriction was valid as it formerly existed, we see no reason why it is not also now valid. There has been no change in the substantive law, other than to alter the brackets above mentioned, and to re-enact the ten per cent limitation applicable to the new constitutional provision.

In this situation then, if the levy made for 1943 produces more than ten per cent of the 1942 levy, it is contrary to the statute, and invalid. However, we are not undertaking to say that the computation of the excess, made in your letter, is correct or incorrect. Just what the excess amount may be, or whether in fact the 1943 levy will produce an amount in excess of ten per cent of the 1942 levy, we leave to be determined by those concerned.

However, assuming that an excessive levy was made, then the method in which those who paid the same can recover such payment is set out under Section 11215 R.S.Mo. 1939.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

LLB/LD

SCHOOLS : Directors of Consolidated Schools
DIRECTORS : may not invest surplus building
: funds in United States Bonds.

February 16, 1944



Honorable Edward Cusick
Prosecuting Attorney
Pulaski County
Waynesville, Missouri

Dear Mr. Cusick:

This will acknowledge the receipt of your letter of February 8, 1944, in which you request an opinion from this office. Your letter, omitting caption and signature, reads as follows:

"I have been requested by the Board of Education of Consolidated School District No. 1, Pulaski County, Missouri to obtain an opinion from you on the following subject:

"the above school district is in the South part of Pulaski County, the South line of the district being the line between Pulaski and Texas Counties. The territory comprising it was organized into a Consolidated School District about 1914 and has functioned as such since, first maintaining a second class High School and then for the past several years a first class High School up to the coming of Fort Leonard Wood.

"When this Fort was laid out and established in this County, practically all of the land area of the district was taken in the Fort Reservation and the lands of course acquired by the Government, except a narrow strip on the South part of the district and a still smaller part on the West side, and in all of the lands left in the district perhaps less than a dozen families living.

"All of the district property was taken by the Government in condemnation. This included a central school plant at Bloodland, Missouri on a five acre tract belonging to the district, and two other school buildings in other parts of the district, each being on a small tract

of about an acre of land. This leaves the district without buildings or property of any kind. The children in the district are being transported to another school District, which is in Texas County.

"It is contemplated at sometime for the remaining part of this district to join another, if that can be worked out, and to take its funds on hand and assist in building when prices will justify a building program.

"The district received the sum of \$28,000.00 plus about \$1,700.00 interest in the condemnation proceedings, which have been concluded, for all of its land, buildings and other property. Out of this sum, the district paid all of its bonded debt and all other accounts and obligations of all kind, leaving the district without about \$15.00 in cash. This fund has been ear-marked a building fund, because it was derived from the proceeds paid by the Government for the district's buildings, land and property.

"This district keeps and maintains its organization and functions with a Board of Education of six members. The board is unanimous in the view that this fund should be invested in bonds of the U. S. in order to bring in some interest and be safely invested until such time as this fund (approximately \$15,000.00) is needed for building purposes.

"Question-- Can the district legally invest such funds in bonds of the United States?

"Your early opinion will be appreciated, so if the investment can be made, it can be done while the present bond drive is on.

"P.S. As you know, a district of this kind has its own Treasurer and keeps its funds."

The establishment and management of Public Schools in the state and in the various districts of the state is vested in a Board of Directors. A statement of the qualifications and the provision for the tenure of office of members of a Board of Directors of a consolidated district may be found at Section 10469, R. S. Mo., 1939. It is unnecessary in this instance to do more than cite the statute. The organization of the Board and duties of various officers is outlined at Sec. 10470 R. S. Mo., 1939. The duties of this board naturally fall into two classes, i.e., mandatory duties and discretionary duties. Our courts have held that the purely discretionary duties of a board may not be controlled by mandamus.

See

State ex rel v. Jones, 155 Mo. 570, 56 S. W. 307
Velton v. District, 222 Mo. App. 997, 6 S.W.(2d) 652
Gladney V. Gibson, 208 Mo. App. 70, 233 S. W. 271

A board of directors of a consolidated school is a creature of the statutes. It may perform any and all authority allowed by statute. The board must find its authority in the statutory enactments in order for their acts to be valid. Unless they can show this statutory authority, they may not act.

The provisions for the creation, operation, management and scope of authority for consolidated schools may be found at Sections 10494, 10496, 10497 and 10498. There may be other sections which might apply but these just cited will be found sufficient to show the authority for the District's formation and subsequent functioning under legislative enactment.

With respect to the acquisition of school sites, the erection of buildings and other matters involving real estate owned by the District, the relation of certain pronouncements and decisions of our courts would seem appropriate at this point. Our courts have held that Board of Consolidated District had power to

select new school site without vote of the taxpayers.

Crow v. District, 36 S. W. (2d) 676

State ex rel District 224 App. 120, 21 S.W.(2d) 645

The board of a city, town or consolidated district, has power to locate and authorize the purchase of sites for school houses without vote of tax payers.

Gladney v. Gibson, 208 App. 70, 233 S.W. 271

State ex rel Gehrig v. Medling, 29 S. W. (2d) 1040

Having discovered that a board of a consolidated district may acquire a site and construct a building, we turn to some expression of authority which would enable them to consolidate in the first instance and operate as a consolidated district. For this authority we refer to Sections 10487, 10493, 10494 and 10495. In the event a school is closed and a board has such authority so to do, the matter of transporting the pupils of the closed school and the procedure required for voting on such a question is to be found at Section 10496, R. S. Mo., 1939.

Title to the property of the district is held by the board. See section 10403, R. S. Mo., 1939, which reads:

"The title of all school house sites and other school property shall be vested in the district in which the same may be located; and all property leased or rented for school purposes shall be wholly under the control of the board of directors during such time; but no board shall lease or rent any building for school purposes while the district school house is unoccupied, and no school house or school site shall be abandoned or sold until another site and house are provided for such school district. "

In construing this section our courts, in a leading decision have held:

"In Missouri, the property of school districts acquired from public funds is the property of the state, not the private property of the school district in which it may be located, and the school district is a statutory trustee for the discharge of a government function

entrusted to the state by our Constitution."

District of Oakland v. District of Joplin,
102 S.W. (2d) 909.

Those sections of the statute devoted to surplus funds of a district are found to read as follows:

Sec. 10434. Loan of surplus district school money.--

"Whenever it shall be found that any school district has any surplus funds in the county treasury, the directors of such school district may make application, in writing, to the county court, setting forth that school funds are accumulating beyond the wants or necessities of such district. Upon such application, it shall be the duty of the county court to cause such funds to be loaned for the use and benefit of such school district."

Sec. 10435. How loaned.

"Such school funds shall be loaned at the same rate of interest and in the same manner as township school funds are loaned; Provided that no school tax shall be levied in such district other than for incidental expenses during the time for which such surplus fund is sought to be loaned; and provided further that a free public school shall be maintained in such school district for at least eight months in each year. "

Those portions of our statute relating to the management of school funds in the state by the County Court have been the subject of recent revision by the 62nd General Assembly. Because of limited space, we cite them for your study and merely comment upon their construction.

See 1943 Laws of Mo., p. 880, for these revisions of sections 10376, 10383, 10384, 10384A, 10385, and 10386.

Feb. 16, 1944

The collection, investment and preservation of County School funds is changed considerably under these new sections. The procedure has been made mandatory and little or no discretion is afforded the County Court. Restrictions have been imposed and considerably enlarged, with the idea of preserving and protecting funds of the various districts.

We again repeat the holding of our court, when called upon to consider the power and jurisdiction of a county court. Here is the language of this decision;

"A County Court is a body having limited power and jurisdiction. These powers are defined by statute."

Consolidated Dist. v. Jackson Co. 84 S.W. (2d), 988.

CONCLUSION.

From our reading of the authorities and the statutes involved, it is therefore the opinion of this department that no authority is expressly given the Board of Directors of a consolidated district to invest surplus funds belonging to the school district, as outlined in the present situation, in U. S. Bonds. In this absence of statutory authority the Board may NOT invest surplus funds in United States bonds.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

LIM:LeC

SPECIAL ROAD DISTRICTS: Current revenue may be applied only to current debts, and back and outstanding warrants may be paid only from surplus and delinquent taxes.

March 22, 1944



Honorable Lieu. Cunningham, Jr.
Prosecuting Attorney
Camden County
Camdenton, Missouri

Dear Sir:

We are in receipt of your letter of March 11, 1944, requesting an opinion from this department. Your letter reads as follows:

"Last Thursday the Camden County Court and the County Treasurer were in your office to discuss the above matter with you. I understand that you instructed them to have me request a written opinion upon the matter.

"In Camden County we have a 1¢ Common road tax collected over the entire County and a 25¢ Special Road and Bridge Tax collected over the entire County.

"Several years ago we had a County Court which overdrew the Special Road and Bridge fund to a considerable amount, at the present time there is around \$8,879.48 protested and outstanding Special Road and Bridge Warrants, dated from 1939 to 1941.

"The County Treasurer has at the present time a balance in the Special Road and Bridge fund of \$20,193.95.

"The County Court has for several years apportioned the Special Road and bridge fund among the Special Road Districts of the

County according to their respective assessed valuations, and now wishes to transfer said balance in said funds to the Special Road Districts, and pay the balance of said funds to the Common Road Districts to be used upon their roads, and leave approximately \$3,000.00 in said Special Road and Bridge Fund to apply to the back warrants. The Treasurer does not wish to do this until she is assured she is not responsible for the other back warrants, and wants your opinion as to whether the funds can be transferred to the Special Road Districts and the Common Road Districts before all of the old warrants are paid in full.

"The County Court wishes to know whether it has authority to allocate said Special Road and Bridge funds among the Special Road Districts and also the Common Road Districts according to their respective valuations. Of course the Common road tax is always so apportioned, however it is so small it does not help any appreciable amount.

"As it is time for the apportionments to be made the County Court is very anxious to have your opinion upon this matter at your earliest convenience, that they may take such steps as may be necessary in the matters."

The above request, in effect, states that the county court wishes to apportion approximately \$17,000 from the special road and bridge fund, among the various special road districts in Camden County, and leave a balance of approximately \$3,000 in said fund to apply on the payment of protested and outstanding special road and bridge warrants totaling nearly \$9,000. The request does not state the nature of the amount of money on hand now in this fund. In other words, it does not state whether this fund represents current revenue or whether it represents a balance or surplus left over from preceding years and not claimed by any

special road district. Investigation by this department reveals that under the audit of December 31, 1941, there was a balance in the sum of about \$1,500 left in this fund. It seems to us unlikely that over \$18,000 would be added to this figure between December 31, 1941, and January 1, 1944, as a surplus.

Since we are undecided whether this fund is wholly a surplus or wholly current revenue, or is composed of funds of each of those two classes, it will be necessary for us to consider both situations.

Under date of November 28, 1940, this department sent an opinion to you wherein it was stated that it is a well recognized principle of law, in so far as it relates to counties, that the revenue of a current year cannot be used to pay indebtedness of past years.

By Section 12, Article X, of the Constitution of Missouri, the credit system, as often referred to in relationship to counties, was abolished and counties were placed on a cash system, that is, current revenue must be applied to current expenses.

The case of State ex rel. v. Johnson, 162 Mo. 621, 1. c. 632, was quoted in that opinion, a portion of which we quote herewith:

"The preferred right of payment according to registration is not taken away further than the changed condition wrought by the Constitution requires, and when the Constitution is read into and with this section, it merely changes the order of payment so that the funds provided for each year's expenses is primarily the fund out of which warrants drawn for those expenses are to be paid according to their presentation and registration in that year, and when they are all paid and a surplus, as in this case, remains, then it is applicable to unpaid warrants of former years and section 6771, Revised Statutes 1899, provides the rule of priority just as it did before its modification by the Constitution

of 1875, and the surplus is not to be distributed pro rata."

Trask v. Livingston County, 210 Mo. 1. c. 597, 600, and State ex rel. Clark County v. Hackmann, 280 Mo. 1. c. 696, 697, were cited in this opinion as upholding the statement that current revenue can be used only to pay current indebtedness.

The case of Billings Special Road District v. Christian County, 5 S. W. (2d) 378, 1. c. 381, supports the statement, in the following quotation, that when timely application is made by a special road district for its portion of taxes collected under this section, the county court must transmit to the district its proper share:

"However, in State ex rel. v. Barry County, 302 Mo. 279, 258 S. W. 710, it was held that while section 10682 made no provision for distribution of the taxes collected thereunder, yet that, under the provisions of section 10818, applicable to special road districts, it is required that all taxes for road and bridge purposes collected by virtue of any existing law or any subsequent law thereafter enacted, upon property within a special road district, shall be set aside to the credit of such district to be paid to the treasurer of such district, upon written application of the commissioners of such district. The county court is required, as such taxes are paid and collected, to apportion and set them aside to the credit of the district." (Emphasis ours.)

If the balance in the special road and bridge fund consists entirely of current revenue, and timely application is made by special road districts in the county, then the entire balance must be apportioned under the authority of Section 8527, R. S. Mo. 1939, which reads as follows:

"In addition to the levy authorized by the preceding section, the county courts of the counties of this state, other than those under township organization, in their discretion may levy and collect a special tax not exceeding twenty-five cents on each one hundred dollars valuation, to be used for road and bridge purposes, but for no other purposes whatever, and the same shall be known and designated as 'the special road and bridge fund' of the county: Provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any road district shall be paid into the county treasury and placed to the credit of the special road district, or other road district, from which it arose, and shall be paid out to the respective road districts upon warrants of the county court, in favor of the commissioners, treasurer or overseer of the district, as the case may be: Provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any road district, special or otherwise, shall be placed to the credit of the 'county road and bridge fund' and be used in the construction and maintenance of roads, and may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village; but no part of said fund shall be used to pay the damages incident to, or costs of, establishing any road: Provided further, that no warrant shall be drawn in favor of any road overseer until an account for work done or materials furnished shall have been presented and audited by the county court."

3-22-44

On the other hand, if all or a portion of the so-called "balance" in the special road and bridge fund consists of an actual surplus carried over from previous years, or delinquent taxes paid on previous years, then reference to the 1940 opinion rendered you will show that we advised that such funds could and should be used only for the payment of back warrants. To the extent that such funds represent a surplus, the county treasurer would not be authorized under Section 13833, R. S. Mo. 1939, in our opinion, to protest these warrants since actually there are funds in the account which legally should and must be used for the payment of these unpaid warrants. To the extent that the fund represents current revenue, the county treasurer is authorized to pay only current warrants.

The above and foregoing constitutes the opinion of this department.

Respectfully submitted

RALPH C. LASHLY
Assistant Attorney General

APPROVED:

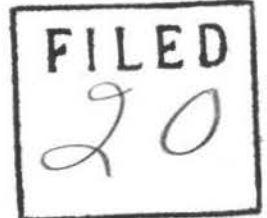
ROY McKITTRICK
Attorney General

RCL:HR

PUBLIC : Section 10342 A, Laws of Mo., 1943,
OFFICERS. : p. 890, is not retroactive in re-
: quiring terms of new teacher's
: contract to be same as terms of
: teacher's contract for year preced-
: ing effective date of act.

June 12, 1944

Honorable Edward Cusick
Prosecuting Attorney
Pulaski County
Waynesville, Missouri



Dear Mr. Cusick:

This will acknowledge the receipt of your letter of June 6, requesting an opinion of this office, which is as follows:

"I have been asked for an opinion relating to the effect of Section 10342A. an amendment of the school laws, passed by the last Legislature and appearing at page 890 of the Session Acts for 1943, same approved April 23, 1943.

"A school district in Pulaski County, Missouri, having made a contract with a teacher in August, 1943, for the 1943-44 school year, failed to give the notice required, relating to termination of the teacher's contract. It is understood that the district has since employed another teacher; and the question is who is entitled to employment, having this section in mind. The section in question clearly extends the contract of the teacher for another year in case of failure of notice by the school board of termination. However, after consideration, I have questioned whether or not this section would apply to a contract which had been entered into before the effective time of the section. This presents the question when this particular section became effective, having been approved April 23, 1943. Would this section become effective ninety days after it was approved or ninety days after the adjournment of the Legislature? The first instance would make it effective about July 23, 1943, the latter about November 23, 1943. The contract in question was entered into about the first of August, 1943.

"For your information is passing upon this question, we find that at least one other state court has held that inasmuch as a contract is made in contemplation of the laws then in effect, unless the act has a retroactive provision, it would not apply to a contract entered into before its enactment, as the provision for continuance of the contract could not have been in contemplation at the time entered into.

"Inasmuch as this matter might arise in other counties I would greatly appreciate your attention and advice upon the same, I remain,"

In an opinion of this office on August 31, 1943, to Honorable Dwight H. Brown, Secretary of State, it was held that a law where there was no emergency clause contained therein became effective ninety days after the adjournment of the session at which it was enacted. Under this interpretation, the law here in question became effective on November 23, 1943.

Sec. 10342A, Laws of Mo., 1943, p. 890, provides:

"Except as may be otherwise provided by law, the provisions of Section 10342 relative to the time and manner of employing teachers shall apply only to their original employment; and their re-employment shall be subject to the regulations hereinafter set forth. It shall be the duty of each and every board having one or more teachers under contract to notify each and every such teacher in writing concerning his or her re-employment or lack thereof on or before the fifteenth day of April of the year in which the contract then in force expires. Failure on the part of a board to give such notice shall constitute re-employment on the same terms as those provided in the contract of the current fiscal year; and not later than the first day of May of the same year the board shall present to each such teacher not so notified a regular contract the same as if the teacher had been regularly re-employed. Any teacher who shall have been informed of re-election by written notice of tender of a contract shall within fifteen days thereafter present to the employing board a written acceptance or re-

jection of the employment tendered; and failure of a teacher to present such acceptance within such time shall constitute a rejection of the board's offer. Any contract given a teacher may be terminated at any time by mutual consent of the teacher and the board. When the board of directors of any school district deems it advisable to close the school and send the pupils elsewhere rather than employ a teacher, said board of directors shall have power to terminate any contract continued under the provisions of this section by giving the teacher written notice of such termination not later than the first day of July next following the teacher's re-employment." Approved April 23, 1943.

The act here required to be performed would be in April of 1944. This would clearly be after the effective date of the law in November, 1943. It is difficult to see how this could be regarded as retroactive. The legislature is merely specifying the terms of the teacher's contract for the 1944-45 school year, in the event you fail to give the notice required by the law. The legislature has said that, in that event, the teacher will be considered as hired for the coming year and the terms of the new contract shall be the same as those provided in the contract of the current fiscal year. Nothing would be done that would affect or in any way change rights already accrued under the former contract.

In 43 Am. Jur., Sec. 248, it is stated:

"In the absence of any constitutional prohibition, state legislatures have power to enlarge, repeal, and limit the authority of public officers * * *."

It has frequently been held in this state that the power of an officer to enter into a valid contract must be exercised in manner and form as directed by the Legislature. *Aetna Ins. Co. v. O'Malley*, 124 S.W. (2d) 1114; *State v. Bank of the State of Mo.*, 45 Mo. 528; *State of use of Public Schools v. Crump*, 57 S. W. 1030; *State ex rel. Blackman vs. Hays*, 52 Mo. 578.

In 59 C. J. 171, Sec. 285, it is stated:

"Statutes qualifying or limiting the grant of authority to contract are mandatory, and contracts not conforming thereto are not binding on the state."

Hon. Edward Cusick

-4-

June 12, 1944

It would seem therefore that the legislature has here exercised its recognized prerogative to qualify and limit the authority of public officers. The act in question does not impair the obligation of contracts where it does not effect former contracts but merely prescribed the terms of a new contract to be entered into after the effective date of the act.

CONCLUSION.

It is therefore the conclusion of this office that Sec. 10342A, Laws of Mo. 1943, p. 890, is a valid exercise of the legislative prerogative to qualify or limit the authority of public officers, nor would requiring terms of new teachers contract to be same as contract for year preceding passage of law be a retroactive provision.

Respectfully submitted,

ROBERT J. FLANAGAN
Assistant Attorney General

RJF:LeC

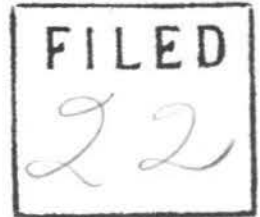
APPROVED:

ROY MCKITTRICK
Attorney General

ELECTIONS:
ABSENTEE
BALLOTS:

If a person in the armed services of the United States applies only for a primary election ballot, he would not automatically be entitled to have a general election ballot forwarded to him without a new application therefor.

August 15, 1944



Mr. C. W. Detjen, Counsel
Board of Election Commissioners
St. Louis County
511 Locust Street
St. Louis (1), Missouri

Dear Sir:

This is a further acknowledgment of and reply to your letter of June 23, 1944, in which you state:

"I am attorney for the St. Louis County Election Board, having been appointed under the provisions of Section 11908, R. S. Mo. 1939.

"The question has been raised before the Board, whether applications being now received from persons in the military service, for primary ballots, are to be retained by the Board and used for mailing out ballots for the general election in November, in those cases where persons applying for primary ballots, should fail to formally re-apply before November. In other words, if a person in military service applies for a primary ballot, will he automatically be entitled to have a general election ballot forwarded to him without a new application therefor? This being a question that might be of State-wide interest, the Board felt that we should follow your opinion in the matter, so that St. Louis County will be acting in uniformity with other political sub-divisions in this connection. Will you please let us have your opinion on this subject at your earliest convenience?

August 15, 1944

"At the Board meeting this morning, one member said he understood that your office had rendered an opinion heretofore, to the effect that persons residing in the State one year and in the County sixty days before the election next November, will be entitled to register and vote at the August primary, even though they might not have resided within the State and County the required length of time before the primary. If you have issued any opinion on this subject, the Board would like to have a copy and I shall appreciate your sending me one."

It is observed from the files of this department that a reply to the second paragraph of your letter was written on July 7, 1944. Therefore, that subject matter will not be further discussed here.

The first paragraph of your letter asks for an interpretation of the Soldiers' Absentee Voting Laws passed by the 62nd General Assembly of Missouri in Extraordinary Session in 1944. These laws consist of six different acts. However, only Senate Bill No. 6, providing for voting absentee ballots by members of the military or naval forces, etc., is pertinent to the question you submit.

Your question is "whether applications being now received from persons in the military service, for primary ballots, are to be retained by the Board and used for mailing out ballots for the general election in November, in those cases where persons applying for primary ballots, should fail to formally re-apply before November. In other words, if a person in military service applies for a primary ballot, will he automatically be entitled to have a general election ballot forwarded to him without a new application therefor?"

Section 2 of the act titled Senate Bill No. 6 is as follows:

"For the purpose of making application for an absentee war ballot to be voted in a general or special election by such absent voter as mentioned in this Act, the application by post card, which is provided for under the

'War Ballot Act' of the 77th Congress, Public Law 712, H. R. 7413, or any written request, telegram, cablegram or radiogram wherein are stated his name, voting address and the address to which the ballot desired by him is to be sent, shall be received and taken by the Clerk of the County Court or Board of Election Commissioners as an application to vote the absentee ballot provided for under this Act. For the purpose of making application for an absentee war ballot to be voted in a primary election by such absent voter, the applicant by any written request, telegram, cablegram or radiogram may make request to the Clerk of the County Court or Board of Election Commissioners of the County or City of his legal residence at the time of his induction into the armed forces, stating in his communication his name, voting address, and the military station, military post office or military address of his present station to which the ballot desired by him is to be sent. Any application received by the Secretary of State shall be deemed to be an application to the county clerks or boards of election commissioners of the various counties or election districts where the elector has his place of residence; and the Secretary of State, immediately upon receipt of such applications, shall send the same by first class mail to such county clerks or boards of election commissioners, who shall handle such applications as made to the Secretary of State in the same manner as though such applications had been made to such clerks or boards.

"Application for an official war ballot for any elector in the armed services of the United States, to be cast in any election, may be made in writing to the county clerk or to the board of election commissioners in the county or city in which the absentee elector was a legal resident at the time of induction into military or naval service, by the father, mother, spouse or next of kin of such person. In such case the applicant shall state under oath relationship between the person applying

for ballot and the absentee elector and the military or naval status of the person in the armed service, insofar as is known, for whom application is being made, his legal residence at the time of induction and his address to which the ballot is to be mailed. The applicant shall request the county clerk or the board of election commissioners to mail the ballot to the absentee elector."

Let us first consider the last paragraph of Section 2 in order to better arrive at what seems to be the real intent and purpose of the Legislature: This paragraph of Section 2 sets forth the officials to whom an application shall be made for a ballot for any elector in the armed services of the United States, the persons who may make the application for the elector, what facts shall be stated in the application, and the procedure to be followed to deliver the ballot to the absentee elector, but nowhere in this section, or elsewhere in the act, is any time whatever fixed when the application shall be made. The act is silent as to the time of making the application.

Now, looking at the first paragraph of Section 2, we find that there are two applications provided for: First, an application for an absentee war ballot for a general or special election, and, second, an application for an absentee war ballot for a primary election.

The apparent intention of the Legislature to require two applications, as set forth in the first paragraph of Section 2, is not changed by the permission given in the second paragraph of said section for such application to be made by a member of the family of the service man or service woman in the United States Army or Navy. On the contrary, it is confirmed in the first part of the second paragraph, where it speaks of a ballot to be cast in any election.

The requirement for an application to be made separately for the primary and general elections would seem to be based on sound reason and to make it as nearly certain as possible that the service man or woman would receive a ballot in time to vote. The service men and women are frequently being moved. Their

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addresses change suddenly and to distant places. The officials charged with sending them the ballots would be at a great effort and useless work if they are not kept advised of the addresses of the service men and women. It is apparent that this was a cogent reason why the Legislature provided for two applications to be made, one for the primary election ballot, and one for the general election ballot.

Many of the ballots which would be sent out for use in the general election, if only one application were required and made for a primary election ballot, would never reach the service man or woman because of a change in address of the elector before time to send out the general election war ballot, and unless a separate and second application be made therefor after the primary election, the purpose of the act would be defeated.

CONCLUSION

It is, therefore, the opinion of this department that if a person in the armed services of the United States applies only for a primary election ballot, neither he nor she would automatically be entitled to have a general election ballot forwarded to him or her without a new application therefor.

Respectfully submitted

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

GWC:HR

ELECTIONS: Amending absentee voting laws.

January 25, 1944



Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

Under date of January 21, 1944, you wrote this office requesting an opinion, as follows:

"Your opinion is hereby respectfully requested on each of the following questions:

"(a) What changes, if any, should be made in the law of Missouri in order that absentee ballots for the primary election may be sent at least forty-five days prior to said primary election to qualified electors of Missouri who are serving in the armed forces of the United States?

"(b) What changes, if any, should be made in the law of Missouri in order that absentee ballots for the general election may be sent at least forty-five days prior to said general election to qualified electors of Missouri who are serving in the armed forces of the United States?"

In order that the reasons for our conclusion will more readily appear, the statutes pertinent to your question will be set out. These statutes are as follows:

Section 11470, R. S. Mo. 1939, as amended by the 62nd General Assembly, Laws of 1943, page 527, authorizes the vot-

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ing of an absentee ballot by persons who are out of the state by reason of military or naval service:

"Any person being a duly qualified elector of the State of Missouri, who expects to be absent from the county in which he is a qualified elector, but within the state, on the day of holding any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected, for any congressional, state, district, county, town, city, village, precinct or judicial offices, or at which questions of public policy are submitted, or any qualified elector absent from the state on military or naval service and who may on the occurrence of any such election be absent from his voting precinct because his duties require him to be without the state on the day of such election may vote at such election as hereinafter provided. Provided, however, any voter who votes both by absentee ballot and in person at any election shall be guilty of a misdemeanor."

Section 11478a, Laws of 1943, page 524, also provides authority for casting absentee ballots by such persons:

"Any person being a duly qualified elector of the State of Missouri who expects to be absent from the State of Missouri by virtue of the fact that such person is a member of any of the various branches of the armed services of the United States as same may be defined by the Executive Departments of the United States of America, and who is so absent on the day of holding any special, general or primary election at which any candidates are chosen or elected for any congressional, state, district,

county, town, city, village, precinct or judicial office or at which questions of public policy are submitted may vote at such election as hereinafter provided, regardless of whether or not said elector has complied with the provisions of any laws requiring the registration of voters."

Section 11478b, Laws of 1943, page 524, requires application to be made not more than thirty days nor less than two days before the election:

"Upon the request of such person in writing, by letter or otherwise, made not more than thirty nor less than two days prior to the date of such election to the county clerk or board of election commissioners, if any, or other official charged herein with the duty of furnishing ballots to such applicants, hereinafter referred to as an election official stating that at the time of such request he is a duly qualified elector of the State of Missouri and reasonably expects at the time of such election to be absent from the State of Missouri or from the United States on the day of such election due to the fact that such person is in the armed services of the United States, such election official shall promptly append the name of such person to the list of applicants for absentee ballots in the manner and form provided for by Section 11472, Revised Statutes of Missouri, 1939, and such election official shall promptly mail to such person absentee ballot in the form and manner hereinafter provided: Provided further that written application for the mailing of absentee ballot to such person in the armed services of the United States may be made upon affidavit submitted by the father, mother or spouse of such person, in which case application and

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affidavit of the father, mother or spouse so applying shall contain a statement as to the military status of the person in the armed services for whom application is being made, his last known address and shall recite that no other similar application is being made on behalf of such person to the best of affiant's information and belief. When such request is made in connection with a primary election, ballots for each political party will be mailed with instructions that voter shall vote one ballot and return the remaining unvoted ballot. In the event more than one request or application for absentee ballot for such person or voter in the armed services should be received by the election official above referred to, an absentee ballot shall be mailed to such person in the armed services only upon and in relation to the first request or application made or received."

Section 11478c, Laws
with the last two above sections.

"Such person or applicant may
ballot and make affidavit re
said section, regardless of the
such person or applicant might not
time be within the territorial limit
the State of Missouri or of the United
States."

By Section 11472, R. S. Mo. 1929, as amended, Laws
1943, pages 527-8, "official absentee ballots" are required
to be printed at least thirty days before the election:

"Application for such ballot may be made
on a blank to be furnished by the county
clerk or the board of election commission-
ers or other officer or officers charged

with the duty of furnishing ballots as aforesaid, or may be made in writing by first class mail addressed to such officer or board duly executed by the said applicant. Immediately upon receipt of such application within the time and in the manner provided by this article, the county clerks of the county, or the board of election commissioners, if any, or other official charged herein with the duty of furnishing ballots to such applicants, shall make a list of the names of such absent voters whose applications for ballots have been received, and shall cause such list to be immediately posted in a conspicuous place accessible to the public at the entrance of the office of such officer or officers which list shall show also the postoffice address, street address, ward or precinct number given by such applicant. Such list shall be supplemented daily by the addition thereto of the names, addresses, and precinct numbers of those thereafter making application for such ballots as by this article authorized: Provided, that no county clerk, board of election commissioners or other proper official charged with the duty of furnishing such ballots after examination of the records, or otherwise ascertaining the right of such person to vote at such election shall be required to furnish any ballot or ballots to any person desiring to vote as by this article authorized who is not lawfully entitled to vote, and if the applicant for ballot or ballots is entitled to receive same, the county clerk or the board of election commissioners, if any, or other official charged with the duty of furnishing such ballots immediately upon receipt of the printed ballots shall send by registered mail postage prepaid, or deliver in person an official ballot or ballots if more than one are to be used and voted at said election to such applicant. The official charged by law with printing and sup-

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plying ballots under the general election laws of this state, shall, at least thirty days before any election held under the provisions of this article, cause to be printed and supplied a sufficient number of ballots to be designated as 'official absentee ballots' to be furnished such absentee voters under the provisions of this article."

Section 11554, R. S. Mo. 1939, requires the secretary of state to certify to the county clerks the names of persons who have filed as candidates at least fifty-five days before the primary election:

"At least fifty-five days before any primary preceding a general election, the secretary of state shall transmit to each county clerk a certified list containing the name and postoffice address of each person who shall have filed declaration papers in his office, and entitled to be voted for at such primary, together with a designation of the office for which he is a candidate, and the party or principle he represents."

At first glance it might appear that the desired result could be achieved by amending the sections relative to making applications for absentee ballots and the printing of the official absentee ballots, to make them read forty-five days instead of thirty days. However, if the application is not received until forty-five days before the election, time would be required to mail out the ballot and forty-five days would not be left for the ballot to reach the applicant and be returned. The same thing would be true as to the printing of ballots, so the period of time should obviously be made longer.

The question of how much time should be given is a practical measure with which the writer has had little contact, but the old adage, "What is time enough always proves little enough," prompts the suggestion that these sections

should be amended to read sixty days instead of thirty days. This would leave fifteen days intervening between the time the ballots are required to be printed and the forty-five days before the election. The section relating to the making of applications could fix an earlier time for the receiving of applications, and it might be well if this were done, as persons in Australia, New Zealand, and other distant points could not nicely gauge the time of the arrival of an application.

Such amendments would not fully solve the problem which exists at the present time. Section 11550, R. S. Mo. 1939, fixes the final date for the filing by candidates of declarations of intention, which is sixty days before the primary:

"The name of no candidate shall be printed upon any official ballot at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate, as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form:
* * * * *

This section would also have to be amended if the time for printing the absentee ballots was fixed at sixty days before the primary. Fifteen days might be sufficient to intervene between the closing of the filing time and the printing of the ballots. This would make the closing date for filing seventy-five days before the primary.

Section 11554, R. S. Mo. 1939, should also be amended to direct the secretary of state to certify to the county clerks the names of candidates filed earlier than the fifty-five days now required. As the general assembly considered five days sufficient time between the closing of the filing date and the certifying of the names of candidates by the secretary of state, it is suggested that this section be amended to read seventy days instead of fifty-five days.

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In regard to your second question as to mailing ballots to electors in the armed services at least forty-five days before the general election, Sections 11470, 11472, 11478a, 11478b and 11478c, supra, apply to general elections as well as to primary elections, and the suggested changes would be sufficient to accomplish the desired result. However, Section 11541, as amended, Laws of 1943, page 536, requires the secretary of state to certify the names of the nominees to the clerks of the county courts not less than thirty days before the election:

"Not less than thirty days before an election to fill any public office, the secretary of state shall certify to the clerk of the county court of each county within which any of the electors may by law vote for candidates for such office, the names and the description of each person nominated for such office, as specified in the certificates of nomination filed with the secretary of state."

This section would have to be amended to conform to the other amendments. As there are more than ninety days intervening between the primary election and the general election, this section could be amended to read seventy days instead of thirty days.

In addition to what has been said, it is desired to call to your attention Section 11474a, as enacted by the 62nd General Assembly, Laws of 1943, page 530, et seq. The first three subsections are quoted for your information:

"In lieu of the foregoing provisions for voting an absentee ballot any qualified elector who is absent from the state on military or naval service, and who may on the occurrence of any election mentioned in Section 11470 of this Act, be absent from his voting precinct because his duties require him to be without the State on the day of such election, may vote an absentee ballot by the following procedure:

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"1. For the purpose of making application for absentee ballot by such absent voter as mentioned in this Act, the application by post card, which is provided for under the 'War Ballot Act' of the 77th Congress, Public Law 712, H. R. 7416, shall be received and taken by the Secretary of State as an application to vote the absentee ballot provided for under this Act.

"2. Within ten day after the time for filing candidates' affidavits for nomination for primary election has expired, and within ten days after the persons have been nominated or elected as candidates for any of the offices mentioned in this Act, it shall be the duty of the clerks of the county courts, the boards of election commissioners in precincts where such boards conduct elections, or, in case of city, town or village elections which are not conducted by boards of election commissioners, the city clerk thereof, to certify to the Secretary of State the names of all candidates who have filed for nomination or who have been nominated as the case may be. Such lists shall be filed in the office of the Secretary of State and for election purposes shall be deemed as the 'official election lists'. The Secretary of State, upon receipt of such official election lists shall compile them and cause same to be printed in pamphlet form in sufficient numbers to meet the demands of the said absent voters. These pamphlets shall contain the names of the candidates for nomination or election, the office to which they aspire, the county, city, village or district in which they are candidates, and assembled under the names of the respective counties, cities, villages or districts in which they are candidates. This pamphlet shall also name the party or independent body under which such candidates are to be nominated or elected as the case may be. A pamphlet for each county and the City of St. Louis may be printed instead of placing all such

lists in one printed pamphlet. Such pamphlet shall also contain proposed amendments to the Constitution of the State or other propositions or questions which may be submitted to a vote in the State at large.

"3. The Secretary of State upon receipt of said lists, shall make requisition upon the clerk of the county court of each county and the city of St. Louis, the boards of election commissioners in cities and counties where such boards conduct elections, or, in case of city, town or village elections which are not conducted by boards of election commissioners, the city clerk thereof, for an appropriate number of regular ballots of said county, precinct, city, town or village, who are hereby required to furnish said ballots without delay, and the Secretary of State shall use said ballots as 'war ballots' in carrying out the provisions of this Section 11474a. Such ballots shall provide for voting for electors for President and Vice-President of the United States, United States Senators and Representatives in Congress, all state officers, county officers, city, town and district officers, as the case may be, and for voting upon any proposed amendment to the State Constitution, or any other proposition or question which is submitted to a vote in the State at large. The ballots for voting upon amendments to the Constitution of the State and other propositions shall be separate from ballots to be used for voting for the nomination or election of officers. The ballots to be used for voting for the nomination or election of officers shall have printed thereon, under the respective titles to the offices to be voted upon, the names of the candidates for President and Vice-President, United States Senators, and State officers who are to be voted upon in the State at large, and sufficient blank spaces shall be left on the ballots under

the appropriate title to the respective district, county and local office to be filled by such election, which blank shall be used by said voter to write in the name or names of his choice of candidates to such office. The names of candidates shall be printed in columns under the name of the party or independent body under which such candidate seeks nomination or election, as the case may be. Blank spaces shall be left in each column under the name of the party or independent body which has candidates whose names are not printed on the ballot. Ballots for voting upon Constitutional amendments and other propositions shall contain the official title of the proposed amendment or proposition, followed by the words: 'For the Amendment.' ('For the Proposition'), and 'Against the Amendment' ('Against the Proposition'). The Secretary of State shall cause to be prepared and printed an appropriate number of official envelopes for use in connection with such official war ballots. Each such envelope shall be gummed, ready for sealing. Upon one side of such envelope shall be printed in substantially the following form the following:

OFFICIAL WAR BALLOT

NAME OF VOTER
RESIDENCE (Street and number, if any).....
COUNTY OF
CITY or TOWN

Upon the other side of the envelope shall be printed the following oath:

OATH OF ELECTOR

I do hereby swear (or affirm), that I am a citizen of the United States and am now of the age of at least twenty-one years, or will be on the (here insert date of election); that I have been an inhabitant

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of the State of Missouri for....years,
next preceding this election and for
.....months preceding such election a
resident of the County of.....resid-
ing at (street and number, if any), in
the City (or Town) of;
that I am in active military (or naval)
service of the United States and that I
have not received or offered, do not ex-
pect to receive, have not paid, offered
or promised to pay, contributed, offered
or promised to contribute to another, to
be paid or used, any money or other thing
as a compensation or reward for the giv-
ing or the withholding of a vote at this
election, and have not made any promise
to influence the giving or withholding
of any such vote; and that I have not
been convicted of bribery or any infamous
crime, or, if so convicted, that I have
been pardoned or restored to all the
rights of a citizen, without restriction
as to the rights of suffrage.

.....
Voter must sign here, and
oath MUST BE administered
and attested.

Subscribed and sworn to before me this....
day of..... 194...

.....
Commissioned Officer."

Subsection 3 should be amended to authorize the early printing of war ballots. This section, as it now exists, directs the secretary of state to requisition from the local officers "regular" ballots to be used as "war" ballots. We have official absentee ballots (Section 11472, R. S. Mo. 1939) and official ballots (Section 11595, R. S. Mo. 1939), but no regular ballots. It may be the intention was to have the official absentee ballots used as war ballots, but if this is to be a workable method of casting absentee ballots, following Public Law 712, enacted by the 77th Congress, subsection 3 will necessarily have to be amended.

Honorable Forrest C. Donnell -13-

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The statutory provisions regarding the submission of constitutional amendments would also need to be amended. Section 11676, R. S. Mo. 1939, as amended by Laws of 1943, page 537, requires the secretary of state to certify to the clerk of the county court of each county questions to be submitted not less than thirty days before the election. This section should be amended to conform to the time for certifying the names of nominees or candidates.

The foregoing constitute the major changes that would be necessary to achieve the result suggested in your letter. The state has a large number of election statutes which apply only in cities and counties of a specified population, and due to the limited time available these laws have not been as carefully checked for conflicts with the suggested changes as they should be. This office will gladly continue checking these statutes applying in particular cities and counties to determine if any of them are in need of amendment. However, it might be advisable to contact the various election boards that administer these laws with the view of ascertaining such changes, if any, as might be necessary.

Respectfully submitted

W. O. JACKSON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOJ:HR

PURCHASING AGENT: An employee of a department may be designated to certify as to sufficiency of appropriations and allotments on purchases through purchasing agent.

January 26, 1944.

Honorable Forrest C. Donnell,
Governor of Missouri,
Jefferson City, Missouri.



Dear Governor Donnell:

Your letter of January 4, 1944, is as follows:

"Section 14592 (H. B. 500 of the Sixty-Second General Assembly of Missouri; Laws of Missouri of 1943, l.c. 1005) reads as follows:

"No department shall make any purchase except through the purchasing agent as in this chapter provided. The purchasing agent shall not furnish any supplies to any department without first securing a certification from an official of the department, designated by the department to act in its behalf, and who shall furnish bond in an amount deemed sufficient by the Governor to protect the state against any loss, that an unencumbered balance remains in the appropriation and in the allotment to which the same is to be charged, sufficient to pay therefor. The purchasing agent shall be liable personally and on his bond for the amount of any purchase made by him without such certification and the departmental official shall be liable personally and on his bond for the amount of any false certification."

: "Your opinion is respectfully requested on the following question:

"May the Governor designate an employee of the Governor's office as an official referred to in said Section 14592?"

The precise question presented is whether an "employee" of your office is an "official" of the department within the meaning of the latter term as used in Section 14592, as set forth in your letter. We find that on occasions courts hold the term "official" to designate an officer in the technical sense of that word, and on other occasions it is held to mean a mere employee, depending in each instance upon the context in which the word is found and the legislative intent. For example, in *Loard v. Como*, 137 S.W. (2d) 880, 882 (Tex.) it is said:

"There are material distinctions between one occupying an official position and another who performs duties purely by virtue of employment. An official may be and often is elected by the resident electors; he subscribes the oath of office and is entrusted with the performance of some of the sovereign functions of government; is subject to removal for failure to so perform the duty or for misconduct or malfeasance in office; his election or appointment is for a definite period of time and his services thereby become continuing and permanent rather than temporary and transitory, as is the case of an employee* * *."

This case, in defining an official, applies the usual criteria followed in Missouri in distinguishing between an officer and an employee. *State ex rel. Pickett v. Truman*, 64 S.W. (2d) 105; *State ex rel. Walker v. Bus*, 135 Mo. 325; *State ex rel. v. Hackman*, 300 Mo. 59; and *Hasting v. Jasper County*, 314 Mo. 144.

An example of the other line of authority is *Love v. Miss. Cottonseed Products Co.*, 159 So. 96 (Miss.) where it is said:

"An official is not necessarily an officer in the technical sense, but may be one having subordinate administrative or executive powers in a governmental or public institution."

Of course, the reason underlying this rule is that "the word 'official' and the cognate words 'office' and 'officer' are

often used in a broad sense" (Pennell v. City of Portland, 125 Atl. 143, 144 (Me.)) rather than in the restricted technical sense.

Turning to the statute in question, we find that this certifying "official" is to be "designated by the department to act in its behalf." A department can only act to make this designation through the executive head thereof, which is either a board or a single individual. It does not appear that the Legislature had in mind that a department head would designate himself to do this act, but rather some other person. If self designation was contemplated, then this language is exceedingly misleading for it gives the impression that someone other than the department head will function as certifying official. Further, there are several departments having no one in them except the head thereof that could qualify as an "officer" in the technical sense of that word. One example of that situation appears in Chapter 105 R. S. Mo. 1939, relating to the State Purchasing Agent, where the statutes create no other position in that department other than the purchasing agent. There is not a single mention of such positions as deputy, chief clerk, or even employees. It would seem strange, indeed, in that situation, for the General Assembly to require the Purchasing Agent's Department (which acts only through the purchasing agent) to designate the purchasing agent (himself, since he is the only officer in that department) as certifying official. Yet, if the term "official" is construed as meaning "officer" in a technical sense, that is what we must conclude the General Assembly required. If that is what that body intended the language used to express, then, to say the least, it certainly expressed its intention in a confusing way, when much simpler and more direct language could have easily been employed.

We do not think it can be said that the General Assembly would use such confusing language to express the idea that in a department, such as the purchasing agent's department, the department head is to act as certifying official. And it is not necessary to attribute such poor method of expression to the General Assembly, if the word "official" is construed as meaning one having subordinate administrative powers, such as are possessed and exercised by employees of departments.

All things considered, we are of the opinion that the word "official" was not used to exclude an employee (as distinguished from an officer) from being designated as certifying official of a department under Section 14592.

Honorable Forrest C. Donnell,

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1-26-44.

CONCLUSION

It, therefore, is our opinion that the Governor may designate an employee of his office to certify as to the sufficiency of appropriations and allotments in making purchases through the State Purchasing Agent.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General.

LLB/LD

APPROPRIATIONS: Deficiency bill pay tuition of Negro students at out-state schools, is valid, even the obligation was illegally incurred.

January 31, 1944.



Honorable Forrest C. Donnell,
Governor of Missouri,
Jefferson City, Missouri.

Dear Governor Donnell:

Your letter of December 30, 1943, is as follows:

"Section 22 of House Bill No. 657 of the Sixty-Second General Assembly of the State of Missouri reads as follows:

"There is hereby appropriated out of the State Treasury chargeable to the general revenue fund the sum of Thirteen Thousand Forty-One Dollars and Twenty-Two Cents (\$13,041.22) to pay the tuition of Negro students during the biennial period 1941-1942."

"A message, which accompanied said bill, to the House of Representatives of the Sixty-Second General Assembly of the State of Missouri from myself, reads in part as follows:

"Although there are approved the following items, namely: * * * *

"(d) the appropriation of the sum, set forth in Section 22, of Thirteen Thousand Forty-One Dollars and Twenty-Two Cents (\$13,041.22); * * *

"I have the assurance of the State Auditor that a warrant will not be issued by him for any part or all of the sum appropriated by any one of said Sections 6, 15, 18, 22, 24, 43 and 50 respectively until and unless either (a) it shall have been adjudged by the Supreme Court of Missouri that such

warrant should be issued or (b) there shall have been delivered to the State Auditor the written opinion of the Attorney-General of the State of Missouri that, under the law, such part or all respectively of such sum so appropriated can be recovered by suit from the State of Missouri."

"Your opinion is respectfully requested on the following question:

"Under the law can part or all of the sum appropriated by said Section 22 be by suit, to-wit mandamus against the State Auditor, recovered from the State of Missouri by the holder of a claim for tuition of a negro student during the biennial period 1941-1942?"

Section 22 of House Bill 657 of the 62nd General Assembly appears in Laws 1943, p. 281. It purports to provide funds to pay certain tuition incurred during the 1941-1942 biennium after the exhaustion of the \$40,000 provided by the 61st General Assembly for that purpose. (Laws 1941, p. 274, Sec. 2). Our conclusion turns on whether Section 22, providing \$13,041.22 for this deficiency, is a valid legislative act.

In order for these claims to have been legally incurred three things must be made to appear:

First, that there is a substantive law authorizing Lincoln University to arrange for the attendance of a student at some other school and to pay his tuition.

State ex rel. Kelly v. Hackman, 275 Mo. 636, 654, 205 S.W. 161;

State ex rel. Bybee v. Hackman, 276 Mo. 110, 116, 207 S.W. 64;

State ex rel. Bradshaw v. Hackman, 276 Mo. 600, 607, 208 S.W. 445.

Second, the arrangement to send the student to the other school and to pay this tuition was made in strict conformity to the requirements of law.

State ex rel. McKinley Pub. Co. v. Hackman, 314 Mo.33, 282 S.W. 1007, 1013;
Spitcaufsky v. Highway Commission, 349 Mo. 117, 159 S.W.(2d) 647, 652;
Sager v. Highway Commission, 349 Mo. 341, 160 S.W.(2d) 757, 759;
White v. Jones, Mo. Sup. No. 38,681 Jan. Call Term 1944, not yet reported;
Dement v. Rokker, 126 Ill. 174, 194.

Third, there was an unexpended appropriation in existence at the time arrangements were made to send the student to the other school, and also an unexpended allotment thereof, sufficient to pay the tuition of such student.

Section 10907, R. S. Mo. 1939.

Our view of the conclusion to be reached, makes it unnecessary to state the above legal rules more fully than we have done, because this opinion rides off on the power of a succeeding General Assembly to pay these items even though they were illegally incurred.

However, it may be conceded that Section 10779, R. S. Mo. 1939, expressly authorizes Lincoln University to arrange for the attendance at other schools by these students and provides for the payment of their tuition. Thus, the first condition to a valid obligation exists. For the purposes of this opinion we must assume that the second condition was complied with. It is very clear, however, that at the time these tuition obligations were incurred, the appropriation and allotments thereof had been exhausted and therefore the third condition was not met. But even though Section 10907 R. S. Mo. 1939, may have been violated in incurring these obligations, such does not prevent a succeeding General Assembly from authorizing their payment, because the constitutional prohibition against payment of obligations illegally incurred is limited to a certain class of obligation.

The Constitutional prohibition is contained in Section 48 of Article 4, as follows:

"The General Assembly shall have no power to * * * pay nor authorize the payment of any claim * * * created against the State * * * under any agreement or contract made without express authority of law;* *".

We have no doubt but that these tuition obligations are "claims" created against the state without express authority of law, because Section 10907 was violated in their creation, but were they created under an "agreement or contract"?

Those are the words which limit the field to which this prohibition applies.

These words are in the Constitution, and: "Words, especially those of a Constitution are not to be read with * * * stultifying narrowness". United States v. Classic, 313 U. S. 219, 85 L. ed. 1368, 61 S. Ct. 1031, 1039-40. In a broad sense, it is said in Sage v. Wilcox, 6 Conn. 81, 85, that:

"The word 'agreement,' in its popular and usual signification, means no more than concord; the union of two or more minds; or a concurrence of views and intention. The remote, or proximate, is a distinct thing, which, with little power of discrimination, every mind can perceive. This concord or union of minds, may be lawful or unlawful; with consideration, or without; creating an obligation, or no obligation. Still, by the universal understanding of mankind, proved by daily and hourly conversation, it is an agreement; and it is not the less so, because it is opposed to law, or even to good morals.
* * *

The word contract has much the same meaning. "A contract is the thing upon which two or more people agree." Southern Ry. Co. v. Huntsville Lbr. Co. 67 So. 695, 696 (Ala.). It "arises from the meeting of the minds of the contracting parties, knowingly and understandingly entered into." Windsor v. International Life Ins. Co. 325 Mo. 722, 29 S.W.(2d) 1112, 1116. The terms are in fact synonymous. Michael v. Kennedy, 116 Mo. App. 462, 148 S.W. 983.

Section 10779, R. S. Mo. 1939, is the authority under which these obligations were incurred. It provides:

"Pending the full development of the Lincoln University, the Board of Curators shall have the authority, if and when any qualified negro resident so requests, to arrange for his attendance at a college or university in some other state to take any course or to study any subjects provided for at the State University of Missouri, and which are not taught at the Lincoln University, and to pay the reasonable tuition fees for such attendance."

This section contains two grants of authority. They are:

- (1) authority to arrange for the attendance of a negro at a college or university in some other state; and,
- (2) authority to pay the reasonable tuition fees for such attendance.

But, this authority may only be exercised under certain conditions. Those conditions are:

- (1) when requested to do so by a qualified negro resident,
- (2) who desires to take a course, or to study a subject provided at Missouri University, but which is not taught at Lincoln University.

The procedure contemplated by this statute is substantially as follows: The negro resident informs the board of his desire to study medicine. In order to be "qualified" his educational background must be such that he will be admitted to a medical school, so the board must ascertain if he has such educational background. A medical course is given at the Missouri University, but not at Lincoln University, so the person is entitled to have the board arrange for his attendance at a university in some other state to study medicine. The university must be selected, its tuition fees ascertained and determined to be reasonable. When that is done, then, upon the entrance of the negro in that university, the Board of Curators of Lincoln University may pay the tuition fees of that student to the other university.

Does an agreement or contract arise out of this, either between Lincoln University and the student, or between Lincoln University and the university in the other state? We think not. As between Lincoln University and the student, there can be no meeting of the mind such as is essential to the creation of a contract. The student presents himself and his qualifications to the board. He is either an eligible resident, or is not an eligible resident. No meeting of their minds is involved in making that determination. The course he desires to take either is or is not taught at Missouri University, and either is or is not taught at Lincoln University. In making that determination no meeting of their minds is involved. The board selects the other University which he is to attend, and while it may, and properly should, defer to the wishes of the student in this respect, neverthe-

less the board must make the decision, so there can be no meeting of their minds in this respect. At least not in the sense of a mutual meeting of the minds arrived at as the result of negotiations between persons with equal bargaining powers. Here the student cannot bargain, he may only request that a certain University be selected for him, but the board is not bound to select the school he requests. The question of reasonableness of the tuition of the selected university does not involve the student, but only involves the board of Lincoln University and the governing body of the other school.

As between Lincoln University and the governing body of the other school, only two things are open. First, will said school admit this student, and, second, what is the tuition. These are both governed by the rules of that school. He is either eligible for admission or he is not, depending upon whether he can meet the entrance qualification laid down by that school. That question is determined by said school by application of its standards of admission to the student's qualifications. That determination is in no way dependent upon negotiations, finally resulting in a meeting of the minds between Lincoln Board and the governing body of the other school. As to the tuition, it is fixed by the governing body of the other university. No school leaves the amount of tuition an open question, to be arrived at by mutual understanding with the student when he presents himself. Therefore, the determination that a particular sum is reasonable, when made by the board of Lincoln, does not involve a meeting of the board's mind with that of the governing body of the other school. The fixed sum charged by the other school either is or is not reasonable. The Board at Lincoln makes that decision itself, without resort to negotiations with the other school.

In other words, the whole arrangement between Lincoln University, the student and the governing body of the other school, involves the ascertaining of whether a certain state of facts exists, rather than a meeting of minds resulting in a contract.

We are convinced that the essentials of an agreement or contract, as above defined, are entirely absent when a negro student is sent to a university in another state under Section 10779. That being so, then, Section 48, of Article 4 of the Missouri Constitution, being limited in its prohibition to obligations having their foundation in an agreement or contract, does not prevent a succeeding General Assembly from paying these obligations, even though they were illegally incurred.

1-31-44.

To this point, we have gone on the assumption that Section 10779, R. S. Mo. 1939, was strictly complied with in incurring these tuition obligations. However, certain information coming to us indicates that it was not followed, and, therefore, we must consider what effect failure to follow that section has upon our conclusion. The only effect it would have, as we see it, is that the obligation is illegal under two statutes instead of only one. However, since the conclusion of this opinion is governed only by the limited prohibition of Section 48, Article 4, supra, it is in no way affected. Failure to follow Section 10779 (or Section 10907) in incurring these obligations, is not a factor to be considered, when, as here, we are concerned with the power of the General Assembly to pay, by a deficiency bill, obligations not founded on an agreement or contract. Were these obligations founded upon an agreement or contract, failure to comply with either Section 10907 or 10779 would have been fatal to the validity of Section 22 of House Bill 657.

However, we suggest that Section 10779 be strictly pursued, for failure to do so would justify the State Auditor in refusing to audit for payment a tuition obligation against a current appropriation.

CONCLUSION

It, therefore, is our opinion that Section 22 of House Bill 657 (Laws 1943, page 281) is a valid act of the General Assembly and the funds therein provided may be expended to pay the tuition incurred by negro students at schools in other states during the 1941-1942 biennial period. This being so, then the State Auditor could be compelled by mandamus to audit and approve these claims for payment.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General.

APPROVED:

ROY MCKITTRICK
Attorney-General

LLB/LD

COUNTY
SUPERINTENDENT
OF PUBLIC
SCHOOLS

: In determining qualifications of
: county superintendent for public
: schools as to whether this officer
: has taught or supervised schools
: as his chief work at least two of
: the eight years next preceding
: election or appointment, the sum
: derived by adding one school year
: to a number of days accumulated
: during the course of eight years
: is authorized by this statute.
: Aggregate of teaching or supervis-
: ion must be the total of two years
: and must be taken from the eight
: years preceding election or
: appointment.

February 1, 1944

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Honorable Forrest C. Donnell
Governor, State of Missouri
Jefferson City, Missouri

Your Excellency:

This office is in receipt of your letter of recent date in which you request an opinion concerning the qualifications for county superintendent of schools as required in a recent enactment of the legislature. Omitting caption and signature, this request reads as follows:

"Section 1069 of H. B. 94 (Laws of Missouri of 1943, page 891), with reference to county superintendent of public schools, reads in part as follows:

'* * * He shall have taught or supervised schools as his chief work during at least two of the eight years next preceding his election, * * * and a vacancy caused by death, resignation, refusal to serve, or removal from the county, shall be filled by the governor by appointment for the unexpired term, subject to the same qualifications as if the appointee had been elected. * * *'

"Your opinion, as soon as possible, is hereby respectfully requested on the following question:

"In determining whether a person has

taught or supervised schools as his chief work during at least two of the eight years next preceding his election (or appointment) is it legal to count as said two years the sum derived by adding (a) one school year and (b) a number of days, accumulated over the course of said eight years, which days aggregate more than the number of days in a school year?"

House Bill No. 94, was an act introduced in the 62nd General Assembly to repeal Sec. 10609 R. S. Mo., 1939. This section was repealed and reenacted as Sec. 10609, R. S. 1939, Laws of Missouri, 1943, at page 890. This new section relating to the election, qualifications and term of office of County Superintendents of Public Schools, considerably raised the professional requirements of this office and the Legislature insists on, in addition to a proper theoretical background, two years practical experience in teaching. The full text of the section reads as follows:

"The qualified voters of each and every county in this state shall elect a county superintendent of public schools at the annual district school meeting held on the first Tuesday in April 1943, and every four years thereafter. Said County school superintendent shall be a citizen of the county and at least twenty-four years old. He shall have taught or supervised schools as his chief work during at least two of the eight years next preceding his election, or shall have spent the two years next preceding his election as a regular student in a recognized college or university. At the time of his election he shall hold a certificate authorizing him to teach in the public schools of Missouri, and shall have completed at least one hundred twenty semester hours of college work, including at least fifteen hours in the field of education, not less than five of which shall have in school supervision and administration; or he shall be serving as county superintendent of public schools. Each and every county school superintendent elected on the first Tuesday in April, 1943,

and thereafter, shall hold said office for a term of four years from and after the first Monday in July following his election, or until a successor has been chosen and has qualified; and a vacancy caused by death, resignation, refusal to serve, or removal from the county, shall be filled by the governor by appointment for the unexpired term, subject to the same qualification requirements as if the appointee had been elected. The County school superintendent shall turn over all books, papers, certificates, stub-books and records in his possession to his successor. All acts and parts of acts conflicting with this section are hereby repealed.
Approved March 3, 1943."

Whether a county superintendent of schools is a county or state officer has been answered in the affirmative in

Hollowell v. Schuyler County, 323 Mo. 1230, 18 S. W. (2d) 498:

"It is further claimed by the appellant that the superintendant of schools is not a county officer within the purview of article 14 of the Constitution, and therefore the constitutionality of the emergency clause is immaterial. We are unable to understand how that could affect the situation, since the sections upon which appellant depends, 11352 and 11354, apply to superintendents of schools. The superintendent of schools is a county officer, though not specially mentioned in the Constitution. Article 9, Sec. 14, of the Constitution provides that the "General Assembly shall provide for the election or appointment of such other county, township and municipal officers as public convenience may require. * * *"

"He (the county superintendent of schools) shall have taught or supervised schools as his chief work during at least two of the eight years next preceding his election, * * *"

Before proceeding with a construction of this part of the statute, we deem it necessary to refer to the decisions in our courts for a rule to be used in such construction. In passing upon the intention of the Legislature in its enactments, we find this rule announced.

"The intention of the Legislature is to be obtained primarily from the language used in the statute."

Greer v. K. C. Ry. Co. 228 S. W. 454, 286 Mo. 523
St. Louis Ry. v. Clark, 53 Mo. 214
59 C. J. 952, Par. 569 et seq.

Adopting the foregoing rule in the present instance, we conclude that the sentence under scrutiny is clear, concise and unambiguous and needs no construction on our part.

One qualification imposed by the Legislature upon this officer in this new section is this: "He shall have taught or supervised schools as his chief work* * *." (Emphasis ours).

It will be both pleasant and profitable to examine authorities and some other jurisdictions, with a view to discovering what the term "chief work" means with respect to the teaching profession.

As defined by Funk and Wagnalls New Std. Dictionary, 1937 Edition, we find these definitions:

Chief--Principal, most important, foremost, leading main.

Work--Opportunity for labor; employment as a means of gain or livelihood; occupation.

Turning now to other authorities we find at 46 C. J. 896, at note 5, paragraph (b) the following:

"An occupation, in a legal contemplation, means that which practically takes up one's time and energies, especially one's regular business or employment. The word 'Occupation' does not necessarily mean the present occupation but it means that which principally takes up one's time, thought and energy, especially one's regular business or employment. For illustration: A man might have a regular occupation, such as that of a painter, and be out of employment, and might temporarily engage in other business, yet, if he was questioned as to what was his occupation, he would give it in as a painter, that being his general occupation, whereas at that moment he might be engaged in other business as a general occupation."

Supreme Lodge K & L H v. Baker, 163 Ala. 518, 522. 50 S.958.

Also in 12 C.J. S. 791, note 92.

"The chief occupation or business of one, so far as worldly pursuits are concerned, is that which is of principal concern to him, of some permanency in its nature, and on which he chiefly relies for his livelihood, or as the means of acquiring wealth, great or small."

Washburn v. Commissioner of Internal Revenue, C. C. A. 51 F. 2d 949. 952-- In re Mackey, C. C. Cel.110 F. 355, 358.

Du Pont v. Du Pont, Super., 179 A. 500, 503.

And again at 29 Words & Phrases, 158.

"* * * The word 'occupation' * * * must be held to have reference to the vocation, profession, trade or calling which the assured is engaged in for hire or for profit, and not as precluding him from the performance of acts and duties which are simply incidents connected with the daily life of men in any or all occupations, or from engaging in mere acts

of exercise, diversion or recreation.
Evans v. Woodman Acc. Ass'n. 171 P. 643, 644,
102 Kan. 556, L. R. A. 1918 D. 122.

Two leading cases involving the teaching profession have come to our attention, the first, McSherry v. City of St. Paul is a Minnesota case involving a distinction between casual and regular employment. We refer also to a Kansas case, Evans v. Insurance Company, a situation involving the question of a change of employment. The portions of those decisions as they apply in the instant case are as follows:

McSherry v. City of St. Paul, 277 N. W. 541.

"Whether a teacher is 'regularly employed' within meaning of teachers' tenure law must be determined with principal reference to scope and purpose of hiring rather than with sole regard to duration and regularity of service, and where there is a continuing engagement to serve employer at such times as particular and essential service may be needed, employment is not 'casual' but 'regular.' Mason's Minn. St. 1927, Sec. 2935-1.

"The word 'regular' means that which is arranged; symmetrical; steady; uniform; not subject to unexplained or irrational variation; that which is orderly; methodical. The word 'regularly' means in a regular manner; in a way or method accordant to rule or established mode; in uniform order; methodically; in due order; and such is the signification attached to the word in its common and ordinary use. * * *

"The employment of substitute teacher who was required to keep herself in constant readiness to go to any school in city when called upon to do so, and who could therefore take no other job, was not 'casual' but was 'regular' within meaning of teachers' tenure law, and teacher was entitled to benefits thereof. Mason's Minn. St. 1927, Sections 2935-1 to 2935-14. * *

"That teacher in city schools was designated as a 'casual substitute' during portion of

her three years' probationary service did not prevent teacher from being entitled to tenure rights after having rendered three years' probationary service. Mason's Minn. St. 1927, Sections 2935-1 to 2935-14.

"The teachers' tenure law is based upon public policy of protecting educational interests of state, and not upon policy of granting special privileges to teachers, and it should not be strictly construed against a teacher, but should be construed literally to effect general purpose, in view of interest of public at large. Mason's Minn. St. 1927, Sections 2935-1 to 2935-14; Const. art. 8 Sections 1-7. * * *

"A court should construe statutory enactments so as to give effect to obvious legislative intent. * * *"

Evans v. Woodman Association. 102 Kan, 556; 171 Pac. 643; L. R. A. 1918 D, 1. c. 125.

"Although there is some conflict of authority the general trend of the cases is that casual or incidental acts pertaining to another employment than that named do not constitute a change of employment within the meaning of clauses like that under consideration; neither do they operate as a forfeiture or reduction of the amount of benefits. In a note in 7 Ann. Cas. 568, many authorities are collected in support of the rule, which is stated as follows: 'In construing insurance policies which contain provisions for changes in the occupation of the insured, or which classify risks according to occupation, it is the general rule that to be engaged in a certain occupation or employment is not inconsistent with the incidental performance of acts, either of service or pleasure, which do not come within the stated vocation of the insured, and that the doing of such acts does not operate to remove the insured from the vocation in which he is classed.'"

From our reading of the statute involved, the decisions as announced and all other matter in any way pertinent to the question, we believe it to be true that the Legislature intended the "chief work", "employment" or "occupation" of a County Superintendent of Schools in the State of Missouri to be that of TEACHING. In order to qualify for the office, an individual must show that in a period of eight years preceding election or appointment, two years were spent in teaching or supervising schools. You will note that the statute does not require the last two years prior to election or appointment, but says, "during at least two of the eight years next preceding his election."

What constitutes two school years within a period of eight years would seem to be a matter of adding together the days, weeks, or months while so engaged, and if the answer to be had constitutes two years, then the qualifications have been met. We further believe that if the Legislature contemplated that the two preceding continuous years be devoted exclusively to teaching, it would have said so. The language of the statute clearly states that, if in the eight year period, two years have been devoted to teaching, then the individual is qualified.

In situations involving this office, each case will stand or fall upon the peculiar facts as proven. Each person, whether candidate for election or applicant for appointment, must as a matter of proof offer facts to constitute valid qualifications for the office.

C O N C L U S I O N .

It is, therefore, the opinion of this office that in determining whether an individual has taught or supervised schools as his chief work, for a period of two years during the last eight years next preceding election or appointment, the statute imposing qualifications on this officer, authorizes the

Gov. Donnell

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computation of time necessary, by the addition of periods of teaching and supervising, performed during the eight year period preceding election or appointment, and after such calculation of the periods of time, if the total sum is two years, then the statutory requirements have been met.

The obvious intention of the Legislature was to require two years teaching or supervising, within the eight year period preceding election or appointment, and not to require the said period of two years to be continuous and immediately preceding his election or appointment.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LIM:LeC

APPROPRIATIONS: House Bills 408 and 657: Consistent concurrent appropriations are not prohibited; Department of Resources and Development has charge of State Museum or Missouri Resources Museum.

February 3, 1944



Hon. D. Howard Doane, Chairman
State Department of Resources and Development
State Office Building
Jefferson City, Missouri

Dear Sir:

Recently you requested the opinion of this department upon the following:

"The State Department of Resources and Development created by the 62nd General Assembly (Laws of 1943, page 978) respectfully requests your opinion upon the following:

"The General Assembly appropriated certain funds to the Missouri Resources Museum (Section 50, Laws of 1943, page 160) and also appropriated certain funds for such museum by another act, namely Section 53, Laws of 1943, page 293. Apparently this department now has charge of the State Museum (Laws of 1943, pages 983, 984).

"It will be necessary for some of the employees of the department to spend a part of their time on museum matters and this department desires to know if such employees may be paid for such time as they spend on museum matters, out of the funds set up in such Section 50, Laws of 1943, pages 160, 161, and after such funds are exhausted, may the such employees be paid from the funds as provided in Section 53, Laws of 1943, page 293.

"This department also desires your opinion as to paying the proportional part of the expense of the members of the department and their office personnel that is brought about in administering the affairs of the museum, from said Section 50, and if the funds there provided are exhausted, may the balance of such expense remaining unpaid be satisfied out of said Section 53. The department further desires to know if, in your opinion, the Missouri State Museum is now under the direction and control of this department."

The last portion of your request, namely, does the Missouri State Department of Resources and Development now have the direction and control of the Missouri State Museum, will be considered first.

House Bill 502, Laws of 1943, page 983, specifically repealed Sections 15441, 15442 and 15443, R. S. Mo. 1939, and enacted new provisions in lieu thereof. Prior to the passage of House Bill 502, the "Missouri state museum," which included the "Missouri soldiers' and sailors' memorial hall" and the "conservational and historical museum" (Section 15442, R. S. Mo. 1939), was under the management and control of the board of permanent seat of government (Section 15441, R. S. Mo. 1939). Section 10b of House Bill 502, Laws of 1943, page 983, is as follows:

"All of the powers and duties heretofore vested in the Board of Permanent Seat of Government relating to the Missouri State Museum, including the 'Missouri Resources Museum', are hereby vested in and shall be exercised by the State Commission of Resources and Development. There shall continue to be maintained by the commission a Missouri State Museum, which shall be a conservational and historical museum in which shall be collected and displayed such exhibits of the products of the mines, mills, fields and forests of the State of Missouri

and such other articles and products as will display the natural resources of the State of Missouri and their utilization, as the commission may deem necessary and expedient. The commission shall appoint a director of the State Museum, who shall have such duties and responsibilities as the commission may direct. It shall be the duty of the commission to design and install necessary cases, racks, tables and other equipment desirable to the purposes of said exhibits. The Commission of the Permanent Seat of Government shall designate such part of the first and second floor of the Capitol Building as it thinks advisable to be used as a part of the Missouri State Museum and shall also designate a wing or section of such space to be known as the 'Missouri Soldiers' and Sailors' Memorial Hall'. To carry out effectively the purpose of this act, the Commission of Resources and Development shall coordinate its activities relating to the Missouri State Museum with those of the Permanent Seat of Government in the use and utilization of the corridors, halls, walls, and other space within the State Capitol Building as may be necessary for the display and exhibits of the Missouri Resources Museum and the Missouri Soldiers' and Sailors' Memorial Hall. In this connection, it shall be the duty of the commission to receive from the Adjutant-General all matters and records pertaining to Missouri soldiers, sailors and marines serving in all wars declared by the United States, including such inscriptions and tablets as may be desirable and available."

The above section divests the Board of Permanent Seat of Government of the management and control of the Missouri State Museum, including the "Missouri Resources Museum" and its component parts, and vests that management and control in the State Commission of Resources and Development.

House Bill 408 was passed July 1, 1943, and approved July 19, 1943. Section 50 of such Act (Laws of 1943, page 160) provides:

"There is hereby appropriated out of the State Treasury chargeable to the General Revenue fund, the sum of Eighteen Thousand Five Hundred Dollars (\$18,500.00) for the use of the Missouri Resources Museum for the years 1943 and 1944, as follows:

"A. Personal Service:

Salaries of curator, specialist and chief stenographer, chief clerk and bookkeeper, installer and other necessary employees \$15,000.00

"B. & C. Additions, Repairs and Replacements:

Original purchase of educational equipment (Books, magazines, book-cases) office furniture and equipment and other miscellaneous equipment, labor, material and supplies for repairing office furniture and miscellaneous equipment..... 1,000.00

"D. Operations:

Supplies, postage, express, travel, and other communications, printing information 2,500.00

"Total for Missouri Resources Museum\$18,500.00"

House Bill 657 was passed July 12, 1943, and approved July 30, 1943. Section 53 thereof (Laws of 1943, page 293) is as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Twenty-four Thousand Dollars (\$24,000.00) for the use of the State Department of Resources and Development, created by House Bill No. 502 enacted by the 62nd General Assembly, for the years 1943 and 1944, as follows:

"A. Personal Service:

Salaries, wages, and per diem of directors, clerks, stenographers, and all other necessary employees of which amount \$9,375.00 shall be used for carrying on the work of the Missouri Resources Museum from October 1, 1943, to December 31, 1944\$17,500.00

"B. Additions, Repairs and Replacements:

Original purchase of educational equipment (Books, magazines, bookcases) office furniture and equipment and other miscellaneous equipment, labor, material and supplies for repairing office furniture and miscellaneous equipment of which amount \$625.00 shall be used for carrying on the work of the Missouri Resources Museum from October 1, 1943 to December 31, 1944..... 1,000.00

"D. Operation:

General expenses; materials and supplies, communications, postage and express, printing and binding, transportation of things, travel within and without the State, and other general expenses including stationery and office supplies of which amount \$1,575.00

shall be used for carrying on
the work of the Missouri Re-
sources Museum from October 1,
1943 to December 31, 1944.... 5,500.00

"Total\$24,000.00"

While Section 43 of Article IV of the Constitution prohibits money from being drawn from the State Treasury except in pursuance of regular appropriations made by law, there is no constitutional barrier against consistent, concurrent appropriation acts for the same purpose. Several instances may be found where the General Assembly has passed two appropriation acts in the same session for the same purpose.

In the present instance two appropriation acts were passed covering a portion of the same period of time and in some respects for the same purpose. House Bill 408 appropriated certain sums to the Missouri Resources Museum, \$15,000.00 of which is for "salaries of curator, specialist and chief stenographer, chief clerk," etc., "and other necessary employees." House Bill 657 allotted to the State Department of Resources and Development \$17,500.00 for salaries, wages, and per diem of directors, clerks, stenographers "and all other necessary employees of which amount \$9,375.00 shall be used for carrying on the work of the Missouri Resources Museum from October 1, 1943, to December 31, 1944." There is no appropriation to the Missouri State Museum for the present biennium. In 1939 (Laws of 1939, page 56) and in 1941 (Laws of 1941, pages 50, 152) the appropriations were to "Missouri Resources Museum," as in the present biennium. Then, also, no appropriations were made to the Missouri State Museum.

Section 10b of the 1943 Act (Laws of 1943, page 983) vests the former power of the Board of Permanent Seat of Government "relating to the Missouri State Museum, including the Missouri Resources Museum" in the State Commission of Resources and Development. Section 15441, R. S. No. 1939, placed the "Missouri resources museum," the "Missouri soldiers' and sailors' memorial hall," and the "conservational and historical museum" under the domain of the Board of Permanent Seat of Government.

It is a primary rule of statutory construction that the intent of the General Assembly should be determined and given effect. A collection of the Missouri decisions announcing this doctrine may be found in Vol. 29 of West's Missouri Digest, Key No. 181. The above rule has been applied to appropriation acts. *State v. Weatherby*, 129 S. W. (2d) 887, 344 Mo. 1. c. 854.

Apparently the Legislature has intended the "Missouri Resources Museum" to be a generic term, and "Missouri State Museum" to be a more restricted term, so that "Missouri Resources Museum" includes the "Missouri State Museum" as a part of the generic or general term. It follows that an appropriation to the "Missouri Resources Museum" authorizes the expenditure of the sum set out on the "Missouri Resources Museum," the "State Museum," and the "Missouri Soldiers' and Sailors' Memorial Hall." A different construction would tend to defeat the purpose of the appropriation acts and section 10b of the 1943 law.

The meaning of the language of an enactment should be narrowed or broadened to conform to the legislative intent as gathered from its entirety, history and purpose. *Rust v. Missouri Dental Board*, 155 S. W. (2d) 80, 348 Mo. 616.

The two appropriations authorize the expenditure of funds for stenographers and other necessary employees. If it is necessary for employees of the department to spend a part of their time on museum affairs, the time so spent by such employees may be charged to and paid for out of the funds appropriated for personal services to the Missouri Resources Museum in either House Bill 408 or House Bill 657. Of course, each charge can have only one satisfaction. These bills are not inconsistent or repugnant, and where two acts cover, in whole or in part, the same matter, they should be harmonized, if possible, and effect given to both as though they constituted one act. *State ex inf. Major v. Amick*, 152 S. W. 591, 247 Mo. 271.

However, only House Bill 408 provides funds for the compensation of the curator, while only House Bill 567 provides money for the payment of the "salaries, wages, and per diem of directors, * * *." Section 10b of House Bill 502 authorizes the Department of Resources and Development to appoint a "director of the State Museum," and Section 3 of this Act authorizes the appointment of a "Director of Re-

sources and Development." Obviously, the Director of the State Museum is different from the "Director of Resources and Development." They evidently represent two different positions to be filled by different persons. However, we conclude that the terms "Curator" and "Director" of the Museum are synonymous as used in the appropriation contained in House Bill 408 and Section 10b of House Bill 502, and that the salary of the Museum Director or Curator may be paid out of the proper funds provided for in either House Bill 408 or House Bill 657, but that the salary of the Director or Assistant Director (if there be such) of the Department of Resources and Development may be paid only from the money provided by House Bill 657. The reason for the last conclusion is that the Director and Assistant Director of the Department of Resources and Development cannot be classed as employees of the Museum, but are officials of the Department of Resources and Development; and the purpose for which appropriated funds may be used is strictly construed. *Meyer v. Kansas City*, 18 S. W. (2d) 900, 323 Mo. 1. c. 203.

Inasmuch as the last appropriation act (House Bill 657, Laws of 1943, page 293) authorizes the payment of the expenses, including travel, of the State Department of Resources and Development, while the first act (House Bill 408, Laws of 1943, page 160) relates only to the Museum, the curator and employees, and expenses, it is concluded that the necessary expenses of the Commissioners are chargeable solely to the funds appropriated to the Department of Resources and Development by House Bill 657. However, it should be remembered that the funds mentioned in House Bill 408 are charged with the amounts expended on behalf of the Museum under Senate Committee Substitute for House Bill 10. The amounts expended for the Museum under said House Bill 10 and House Bill 408 cannot exceed the total of the items mentioned in House Bill 408. See Section 57, Laws of 1943, page 164.

CONCLUSION

It is, therefore, the opinion of this department (1) that the Department of Resources and Development now has the management and control of the "Missouri State Museum" or the "Missouri Resources Museum" and its component parts; (2) that

February 3, 1944

if it is necessary for employees of the Department of Resources and Development to spend a part of their time on museum affairs, their time so occupied may be paid for out of the funds appropriated for personal service to the Missouri Resources Museum in either House Bill 408 or House Bill 657, but that each charge can have only one satisfaction; that the salary of the Curator or Director of the Museum may be paid from the money allotted by either of the above appropriation acts, but that the salaries of the Director and Assistant Director of the Department of Resources and Development, and the necessary expenses of the Commissioners of Resources and Development, are payable only from the funds set aside by House Bill 657.

Respectfully submitted

VANE C. THURLO
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

VCT:HR

COUNTY : Qualification requirements prescribed
SUPERINTENDENT : in Section 10609 of House Bill No. 94,
OF SCHOOLS : page 891. Laws of Missouri, 1943,
: for County Superintendent of public
: schools have been met by Mrs. Nannie
: Coward.
:
:

February 11, 1944

Honorable Forrest C. Donnell
Governor, State of Missouri
Jefferson City, Missouri



Your Excellency:

This will acknowledge receipt of your letter bearing date of February 9, 1944, in which you request an opinion from this office. Such letter has been handed to me for attention, and omitting caption and signature, reads as follows:

"The bearer of this letter is Mrs. Nannie Coward.

"Your opinion, as soon as possible, is respectfully requested on the following question:

"Does Mrs. Coward possess the qualification requirements, prescribed in Section 10609 of H. B. 94 (page 891, Laws of Missouri of 1943) for county superintendent of public schools?"

"Request for Opinion as to Qualifications of
Person who has Applied for Appointment of
County Superintendent of Schools

"Mr. Arens, the executive secretary of the Governor, states that his investigation of the facts concerning applicant's qualifications for Superintendent of Schools shows:

(1) Applicant is otherwise qualified as to age, citizenship, teacher's certificate, and additional requisites, but the question involves the requirements with reference to supervision and teaching.

(2) During the last eight years, applicant taught one school year.

"(3) During the last eight year period, applicant taught as substitute teacher, three weeks in one school and one week in another school, in Greene County, Missouri, in addition to the one year taught, above mentioned.

"(4) During the eight year period, applicant helped in giving teachers' examinations, a total of 48 days; that is, two days in each examination, three times a year.

"(5) From October 1, 1943, when husband died, who was then County Superintendent of Schools, to January 7, 1944 (three months and four days claimed), applicant performed all the duties of the County Superintendent of Schools' office in Greene County, Missouri.

"(6) During the eight year period and the tenure of office of husband as County Superintendent of Schools, applicant devoted 24 days to grading examination papers for the Superintendent.

"(7) During the eight year period, applicant gave supervisory advice to school teachers of the county, for at least 200 full days.

"(8) At the request of the County Superintendent of Schools, her husband, during the eight year period, applicant has given supervisory advice for a total of 16 weeks to county teachers.

"The above summary of facts is true with the exception that my husband became ill on October 4, 1943, and died January 7, 1944. In addition, I desire to detail the following facts: The days enumerated as being devoted to work and supervision in connection with the office of County Superintendent of Schools do not take into account any time so spent in the year I taught school. I taught an eight month term in the school year of 1936-1937, and four weeks as a substitute teacher in a later year, which I now recall as probably being in 1940. In addition to the above, I have not taken into account the fractional part of days spent upon innumerable occasions in the work of the County Superintendent of Schools of Greene County, Missouri.

"During the last eight years ending January 7, 1944, and for a period prior thereto, my husband and I constituted our family. I acted as housekeeper of our home, but as our sole income was my husband's salary as County Superintendent of Schools, my duties as housewife were at all times subjected to the duties of that office. During that period, my chief work was, as it has been for a number of years, school teaching and school supervision. In other words, teaching and supervising schools was my chief concern during such period.

Respectfully submitted

February 9, 1944

Nannie Coward
Mrs. L. H. Coward. "

The qualifications required of a County Superintendent of public schools are to be found in Section 10609, R. S. Mo. 1939, Laws of Missouri, 1943, at page 891. Recently this office had occasion to construe the recent enactment of our Legislature, known as House Bill 94, and after enactment as Section 10609, R. S. Mo. 1939. In construing this section we arrived at the conclusion, when asked to pass on the sole question as to whether in the eight year period prior to election or appointment, several disconnected periods of teaching and supervision, the two year "teaching or supervision" requirement had been met. We thought that such a procedure and method of calculation was authorized under the statutes. We attach a copy of our opinion in that matter.

Upon receipt of the subsequent request, and prior to rendition of this opinion, the writer has been afforded the pleasant and profitable opportunity of interviewing Mrs. Nannie Coward upon matters touching her professional qualifications.

It is apparent from a reading of our opinion of February 1, 1944, that each case, involving a candidate for election or appointment is to be determined from facts peculiar to the individual involved. In the present situation, as viewed from this point, it would seem to be merely a question of the facts surrounding the experience of this prospective appointee.

Proceeding, then, on the theory that each case was bottomed on the facts, we have had the benefit of a personal interview with Mrs. Coward and have appended a written statement submitted by her. As this statement has already been incorporated into and made a part of our opinion, we do no more than call it to your attention.

As established to our eminent satisfaction, the facts pertinent to the case under consideration, we learn from Mrs. Coward that shortly after her marriage to Mr. Coward, she entered school to complete her education. Her study and attendance upon schools has continued up until the present time. She is a graduate of Springfield Teacher's College and has a life certificate to teach in Missouri schools and at the present time has credits at the Missouri University for sixteen hours upon her Master of Arts Degree. During the entire time of her married life, and more particularly, during the many terms of office occupied by her husband, she has assisted him in the operation of his office, at his suggestion and request. She has, in addition to the above, taught school upon various occasions and has done considerable work independently in her husband's office. During his lifetime, she assisted him in all phases of his work and actually discharged the duties of his office for three months and four days. The entire income of the Coward family was received from salary for teaching or administrative work in school. Her work in her chosen profession has been continuous over the years and at no time has she specifically or by implication abandoned the profession of teaching. A portion of her energy, it is true, has been devoted toward making a home for her husband. She has been in a position similar to that of a substitute teacher waiting to be called to service in this profession, if and when needed.

The two factual matters now engaging our attention are contained in this sentence taken from Section 10609, R. S. Mo. 1939, Laws of Missouri, 43 at page 891.

"He shall have taught or supervised schools as his chief work during at least two of the 8 years next preceding his election.*-* * *"

In determining whether she has taught or supervised schools, at least two years of the eight years preceding appointment, we have previously given the facts and we now submit the method of calculation used in arriving at the aggregate answer "two years of the eight years preceding election."

As a basis for computation, we assume a school year to include eight months, and further, a school month includes twenty days. On that basis, here is the experience of Mrs. Coward in "teaching and supervising schools" within the last eight years.

| | | |
|-------|--|----------|
| 1. | A school year, eight months, or (teaching) | 160 days |
| 2. | As substitute teacher, 4 weeks (teaching) | 20 days |
| 3. | Giving teachers examinations (supervising) | 48 days |
| 4. | Acting County Superintendent of Public Schools for three months and four days (Administrative and supervisory) | 64 days |
| 5. | Grading examination papers for School Superintendent | 24 days |
| 6. | Supervisory advice to teachers within eight year period | 200 days |
| 7. | Supervisory advice to teachers sixteen weeks | 80 days |
| Total | | 596 days |

This total is the equivalent of approximately three and one half years teaching or supervising.

The obvious conclusion is that from the standpoint of teaching or supervision, Mrs. Coward has the equivalent of three and one half years, this being one and one half years above statutory requirements.

There remains for our consideration, the question of "chief work", as it involves Mrs. Coward and the facts disclosed in this case. Our position in this matter has been previously expressed, and without trying to be tedious, we again bring to your attention the result of our previous research.

At page four, in the opinion written February 1, 1944, beginning with the fourth paragraph, and continuing through and including page eight, the result of our study appears. We deem it unnecessary to repeat it here because of its extreme length.

On this point, we conclude that the "chief work" of this woman is TEACHING, and this has been true during, not only the last eight, but nearly twenty five years. She chose this profession nearly a quarter of a century ago. Having done so, she set about the business of equipping herself to act in the capacity of a school teacher. She states that having adopted this as her profession, she has at no time abandoned it. Her testimony on this point is clear and convincing.

C O N C L U S I O N .

From the facts as submitted in writing and those adduced by oral testimony and our reading of the statutes involved in this case, we therefore, conclude that Mrs. Nannie Coward has been engaged in teaching or supervising schools in the State of Missouri, for a period of more than two years during the last eight years. That Mrs. Coward has as her chief work, the profession of teaching and has been so engaged for more than eight years next preceding January 1, 1944. That the said Mrs. Coward possesses all the qualifications for County Superintendent of Schools as required under section 10609, House Bill 94, Laws of Missouri, 1943, page 891.

Respectfully submitted

APPROVED:

L. I. MORRIS
Assistant Attorney General

ROY MCKITTRICK
Attorney General

LIM:LeC
Encl.

APPROPRIATIONS: Funds appropriated by House Bill 4, 62nd General Assembly, Extra Session, only available to State Board of Education, but that Board may allot funds to Commission for Blind for rehabilitation purposes.

March 30, 1944



Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Sir:

In reply to your inquiry by telephone today, it is the opinion of this department that the funds appropriated by House Bill 4 of the 62nd General Assembly in extra session are available only to the State Board of Education, but that such Board may allot such funds as it deems proper to the Commission for the Blind, to be administered and expended by that body for vocational rehabilitation of the blind, as provided by Public Law 113 of the 78th Congress of the United States.

Respectfully submitted

VANE C. THURLO
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

VCT:HR



STATUTES) Statutes should be construed broadly enough to carry
IN EXPERIENCE:) out intention of Legislature. Sec. 8195, R. S. 1939,
does not confine those eligible for appointment to
those experiences "within" the building & loan business.

April 7, 1944

4/10



Honorable Forrest C. Donnell
Governor
State of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

The Attorney-General is in receipt of your letter of April 4, 1944, requesting the opinion of this department. Your letter is as follows:

"Section 8195 of the Revised Statutes of Missouri of 1939 reads as follows:

"No person shall be eligible for the office of supervisor of building and loan associations unless he shall have had at least two years' actual experience in the general building and loan business."

"There is enclosed copy of letter, dated March 2, 1944, signed Hilles R. Leslie, to myself. Your opinion is respectfully requested on the following question:

"Has Mr. Hilles R. Leslie had, within the meaning of said Section 8195, at least two years' actual experience in the general building and loan business?"

Mr. Leslie's letter, to which you refer, reads as follows:

"Since T. Victor Jeffries, the Supervisor of the Bureau of Building and Loan Supervision, has resigned his office I am an applicant for the appointment as Supervisor.

April 7, 1944

"I have been employed by Mr. Jeffries as an Examiner in the Bureau of Building and Loan Supervision for a period of two years and seven months. My duties have been making examinations of Building and Loan Associations and acting as Chief Examiner. The examinations are made by the examining force of which I am a member and sent to the office, where they are worked over by me and letters of criticisms written to the Board of Directors of the associations, calling attention to any matter pertaining to the laws of Missouri governing Building and Loan associations. In working at this work, I feel that I have had an opportunity to participate in the General Building and Loan Business in detail, for it is often necessary to confer with managing officers of Building and Loan associations relative to their management and business practices.

"I have spent eleven years in the banking business, which of course makes mortgage loans the same as Building and Loan associations in practically the same form. The difference in banking and building and loan practices are matters of the stock structure only.

"As a precedent, I wish to call your attention to the fact that Governor Stark appointed J. W. McCammon, Supervisor where his background had been the same as mine with the exception of the fact that he had no experience in the mortgage loan business other than the fact that he had been an examiner in this Department the same as I have been.

"Your consideration of my application for the appointment as Building and Loan Supervisor will be very much appreciated."

Construction of Section 8195, R. S. Mo. 1939, seems to be a matter of first impression. This section was originally passed in 1927 and although the chapter has been repealed and various sections amended, this section appears in its original form without amendment. The question presented revolves around the phrase, "in the general building and loan business." Does this mean that applicant, in order to be eligible for appointment hereunder, must have spent the prescribed minimum of time within the organization of a building and loan association or will experience gained in his capacity as State Examiner for the State Bureau of Building and Loan Supervision, suffice?

In every instance of statutory construction, consideration must be given to the intention of the Legislature. In *State ex rel. Wabash Railroad Co., et al. v. Shain et al.*, 106 S. W. (2d) 1. c. 899, the court stated:

"The cardinal rule to be followed in the construction of statutes is to arrive at the legislative intent. 'Rules for the interpretation of statutes are only intended to aid in ascertaining the legislative intent, "and not for the purpose of controlling the intention or of confining the operation of the statute within narrower limits than was intended by the lawmakers"' Sutherland on Statutory Construction, par. 279. If the intention is clearly expressed and the language used is without ambiguity, all technical rules of interpretation should be rejected."

It seems clear that the prime consideration for eligibility is actual experience. Certainly, it cannot be said that applicant has no experience in matters pertaining to building and loan associations, since he has been an examiner of the affairs of such companies. A strict interpretation might be carried even further. An applicant might be found ineligible if, although he had been employed by a building and loan company, the company was not actually conducting a general building and loan business. The words "actual" and "experience" are also susceptible of strict interpretation further limiting the scope of this statute. The phrase and words above set forth are all of a general nature. To interpret this section strictly and limit the field of applicants to those alone who have been employed

by a general building and loan association, would confine the operation of this statute within narrower limits than was intended by the Legislature, the obvious purpose of the statute being to appoint one who is familiar with and skilled in the operation of the building and loan business.

25 C. J., p. 176, defines the word "experience" as follows:

"The term, as commonly understood, means, knowledge gained by observation or trial; knowledge derived from proof furnished by one's own faculties instead of by reason."

As was stated in Chicago, I. & L. Railroad Co. v. Gorman, 106 N. E., 1. c. 899:

"The word 'experience' implies skill, facility or practical wisdom, gained by personal knowledge, feeling or action. International Dictionary."

In Stanley v. C. M. & St. P. Railroad Co., 112 Mo. 601, 1. c. 607, the court stated:

"The word 'experience' means, 'to have practical acquaintance with,' which is equivalent to knowledge."

The following statement is found in State ex rel. Kenney et al., v. Missouri Workmen's Compensation Commission, 40 S. W. (2d), 1. c. 504:

"The fundamental rule in the construction of statutes is to ascertain and give effect to the purposes of the Legislature (Consolidated School Districts v. Hackmann, 302 Mo. 558, 258 S. W. 1011), and a statute must be liberally construed in the light of its underlying reasons, keeping in mind the furtherance of the purpose sought thereby (St. Louis S. F. R. Co. v. Public Service Commission of the State of Missouri, 254 U. S. 535, 41 Sup. Ct. 192, 65 L. Ed. 389)."

April 7, 1944

Having in mind the above rules of statutory construction, it would seem that the only fair interpretation to be placed on this section would be an interpretation broad enough to effect the intention of the Legislature. To hold that the word "in" means "within," would constitute, in view of the purpose or the intent of the Legislature, the strictest kind of an interpretation and would narrow and limit the scope of this section.

In the case of *Lambe v. Donaldson S. S. Line*, 22 Que. Super. 510, 516, the word "in" was held not to be as emphatic as the word "within," in some senses. It is our thought that the word "in," as it is used here, conveys the idea "in connection with." As is stated in 31 C. J. 354, the word "in" is defined as follows:

"A word denoting presence, time or state: not out. The writing in which the term appears must always be considered and looked to for the proper determination and ascertainment of the sense in which the word is used."

It is also significant that the word "the" is used instead of "a." The word "the" embraces an entire group as opposed to the use of the word "a," which would clearly limit the field.

Conclusion

It is the opinion of this department that an applicant who has had at least two years' actual experience in connection with building and loan businesses, is eligible for appointment, and that Section 8195, supra, does not confine eligibility to those actually in the employ of a building and loan company. Whether the present applicant possesses the experience required in comparison with other applicants, is a matter within the discretion of the Governor.

Respectfully submitted,

RALPH C. LASHLY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

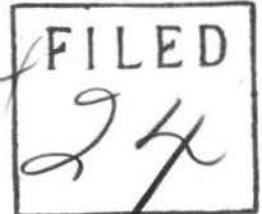
ROY. MC

CONSTITUTION:

House Bill No. 15 constitutional;
the amendment comes within the
GOVERNOR'S SPECIAL MESSAGE: terms of the Governor's Special
Message.

April 19, 1944

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri



Dear Governor Donnell:

We have for attention your letter of April 17th,
1944, in which you request the opinion of this department.
We set forth your letter in full:

"In Proclamation by which the Sixty-Second General Assembly of the State of Missouri was convened in extra session the action of that body is stated to be deemed necessary concerning, among other things, repeal of provision, in subdivision (e) of Section 5728 of Senate Bill 49 of the Sixty-Second General Assembly of Missouri (Laws of Missouri of 1943, page 864 and following), that the annual license fee required by Article 8 of Chapter 35 of said Statutes is intended to cover only the motor vehicle for which it is issued and none other.

"House Bill No. 15 of the Sixty-Second General Assembly in extra session contains, among other things, the below quoted language, which language is not contained in the present Statutes of Missouri:

"A motor carrier may elect to have described on his or its annual license card of any regularly licensed motor

vehicle, trailer or semi-trailer, not more than two emergency vehicles of weight carrying capacity not greater than that of the regularly licensed vehicle upon the payment by such motor carrier of an annual fee of \$5.00 for each alternate emergency vehicle described on said annual license card. Only one of such three vehicles as shown on the annual license card may be operated in the State at any one time.'

"Your opinion, as soon as possible, is respectfully requested on the following questions:

"A

"Had the Sixty-Second General Assembly in extra session power to enact the above quoted language?

"B

"If the Sixty-Second General Assembly in extra session did not have power to enact said above quoted language, is said language severable from the other provisions of said House Bill No. 15?"

We shall answer your questions in the order submitted.

A

"Had the Sixty-Second General Assembly in extra session power to enact the above quoted language?"

That part of your special message to the General Assembly pertaining to the matter under consideration, which gives your reasons calling for the changes in Section 5728 of Senate Bill No. 49 of the Sixty-Second General Assembly of

Missouri, Laws of Missouri 1943, page 864, is found on pages 22 and 23 of your message and is as follows:

"CERTAIN MOTOR VEHICLE LICENSE FEES.

"On December 1, 1943 the Public Service Commission cancelled, effective January 1, 1944, paragraph (a) of a certain then existing rule known as Rule 23, General Order No. 33-B, which paragraph is as follows:

"Every motor carrier at the time of licensing a motor vehicle, trailer or semi-trailer may elect to have described on his or its annual license card two emergency vehicles of weight carrying capacity not greater than that of the licensed vehicle. Either of such described two emergency vehicles will be allowed to operate or be used in lieu of the licensed vehicle, as extra or emergency equipment. Only one of such three vehicles as shown on the annual license card may be operated in the State at any one time; and when either of the emergency vehicles shown on the annual license card is being operated it must carry the annual license card as provided by this Rule, and must be owned or leased by the operator and operated by him or it or his or its servant or servants. Upon the issuance of the annual license card above described if the licensed carrier elects to describe one or two emergency vehicles as provided for above, there shall be paid to the State Treasurer of the State of Missouri an annual fee of \$5.00 for each emergency vehicle described in the aforesaid annual license card."

"Subdivision (e) of Section 5728 of Senate Bill No. 49 of the Sixty-Second General Assembly of Missouri (Laws of Missouri of 1943, page 864 and following) provides

that the annual license fee required by Article 8 of Chapter 35 of the Revised Statutes of Missouri of 1939 is, to quote said Sub-division, 'intended to cover only the motor vehicle for which it is issued and none other * * *'.

"It is my information that motor carriers have been experiencing great difficulty in purchasing and obtaining new equipment and that it is becoming increasingly difficult to keep present equipment in service because of age and numerous breakdowns.

"I hereby recommend the repeal of the provision, in Subdivision (e) of Section 5728 of Senate Bill No. 49 of the Sixty-Second General Assembly of Missouri, that the annual license fee required by Article 8 of Chapter 35 of the Statutes of Missouri is intended to cover only the motor vehicle for which it is issued and none other."

The question to be determined is whether the language used in your special message of March 15, 1944, quoted above, is sufficient for the General Assembly to base the enactment of the new matter found on pages 5 and 6 of Senate Bill No. 15, viz:

"(e) A motor carrier may elect to have described on his or its annual license card of any regularly licensed motor vehicle, trailer or semi-trailer, not more than two emergency vehicles of weight carrying capacity not greater than that of the regularly licensed vehicle upon the payment by such motor carrier of an annual fee of \$5.00 for each alternate emergency vehicle described on said annual license card. Only one of such three vehicles as shown on the annual license card may be operated in the State at any one time. * * * * *

"* * * * *

"* * * Provided, however, such credit shall not apply on alternate or emergency vehicles."

Article V, Section 9 of the Missouri Constitution, relative to the Governor calling an extra session of the General Assembly, reads in part as follows:

"* * * On extraordinary occasions he may convene the General Assembly by proclamation, wherein he shall state specifically each matter concerning which the action of that body is deemed necessary."

The power of the General Assembly at extra sessions is limited by Article IV, Section 55 of the Missouri Constitution, which provides as follows:

"The General Assembly shall have no power, when convened in extra session by the Governor, to act upon subjects other than those specially designated in the proclamation by which the session is called, or recommended by special message to its consideration by the Governor after it shall have been convened."

It will be observed that the Governor, in his message, recommended the repeal of that part of Subdivision (e), Section 5728, Laws of Missouri, 1943, viz:

"The annual license fee required by this article is intended to cover only the motor vehicle for which it is issued and none other; * * * * *"

Is the General Assembly, by the Governor's message, limited to one of two things: either to repeal the above portion of Subdivision (e), or, not to repeal it? We are not inclined to the view that such a narrow construction should be given to the subject that the General Assembly is so narrowly limited by the Governor's message.

In the case of *State v. Tippet*, 317 Mo. 319, 296 S. W. 132, the constitutionality of a part of the motor vehicle law, Extra Session 1921, page 103, was attacked on the ground that a criminal statute which provided that it was a felony for a driver of an automobile to leave the scene of an accident without reporting to a police station or judicial officer, was a violation of Section 55, Article IV of the Missouri Constitution in that it was not within the terms of the Governor's message, which read in part: "'The subject of regulating or licensing motor vehicles, * * *" wherein the court said, l. c. 136:

"We think the statute, relative to leaving the scene of accident, is comprised within the term 'regulating' as used in the special message. *Lauck v. Reis*, supra, defines 'regulate,' among others, as 'to direct by rule or restriction.' It has also been defined as 'a rule prescribed for conduct.' Providing for the stoppage by the operator of a motor vehicle after injury or damage, or the reporting of the same, is directing by restriction or course of conduct the operation or use of the vehicle. That it proscribes free operating after an accident and prescribes a punishment therefor fails to limit the force of the term 'regulating' with respect to motor vehicles. In view of the recognized canon of construction that a statute is not to be held unconstitutional, unless clearly so, and that every fair and reasonable intendment in favor of its constitutionality is presumed, the assignment is ruled against defendant."

What was said by the Supreme Court in the Tippet case was later affirmed in State v. Johnson (Mo.) 55 S. W. (2d) 967, 1. c. 968.

We have read the opinion of the Supreme Court in the case of Ex parte Seward, 253 S. W. 356, 299 Mo. 385, wherein the court discusses at length Section 55, Article IV of the Constitution, with particular reference to the word "recommend" as used therein; in which the court held that it is not essential to use that word in a special message to the General Assembly, although it is used in Section 55, Article IV of the Constitution. The court held that it is there used in the sense that a certain subject matter is committed or entrusted to the Legislature for its consideration.

In the matter under consideration, when the Governor used the expression "I hereby recommend the repeal of the provision, in Sub-division (e) of Section 5728, * * *" it called the attention of the General Assembly to said subdivision of Section 5728 and did not necessarily limit it to a repeal or non-action in reference to same.

The Governor's message clearly informed the General Assembly that he desired legislation relative to motor vehicle license fees, and, while the Legislature did not change the statute in exactly the manner suggested by the Governor, it reasonably came within the terms of the message. By his special message the Governor submitted and entrusted to the General Assembly the subject of amending particular portions of Section 5728. We think that the language in the message was stated to the General Assembly with sufficient specificness as required by Article V, Section 9 of the Missouri Constitution, and the General Assembly was authorized to act, and did act, upon the subject within the limitations of Article IV, Section 55 of the Missouri Constitution.

There is no rule of law more firmly established in our jurisprudence than that a statute is not to be held unconstitutional, unless clearly so, and every reasonable intendment in favor of constitutionality is presumed.

In 11 American Jur., under the subject of "Constitutional Law," Section 92, page 719, it is stated;

"In all instances where the court exercises its power to invalidate, the conflict of

the statute with the Constitution
must be irreconcilable, * * * * *

The same text, Section 128, page 776, reads:

"The basic principle which underlies the entire field of legal concepts pertaining to the validity of legislation is that by enactment of legislation, a constitutional measure is presumed to be created. In every case where a question is raised as to the constitutionality of an act, the court employs this doctrine in scrutinizing the terms of the law. In a great volume of cases the courts have enunciated the fundamental rule that there is a presumption in favor of the constitutionality of a legislative enactment."

As supporting this statement in the text a legion of cases are cited from the United States courts and from practically every state of the Union, including more than twenty from the courts of Missouri. It is our judgment that the Supreme Court of Missouri would hold that House Bill No. 15 is constitutional and that it was passed with due regard to Article V, Section 9 and Article IV, Section 55, of our Constitution.

B

"If the Sixty-Second General Assembly in extra session did not have power to enact said above quoted language, is said language severable from the other provisions of said House Bill No. 15?"

Since it is our opinion that the Sixty-Second General Assembly in extra session had the power to enact this legislation it is unnecessary for us to answer question B in your letter.

CONCLUSION

It is, therefore, our opinion that the amendments to Section 5728, Senate Bill No. 49, Laws of Missouri, 1943, page 864, as made by the General Assembly in its special session in March 1944, by House Bill No. 15, came within the terms of the Governor's Special Message of March 15, 1944, and were constitutionally adopted.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

CRH:CP

OFFICERS; Compensation of State Service Officer may not be increased during present term to \$3600.00 as provided by House Bill No. 28, 62nd General Assembly.

May 3, 1944



Honorable Forrest C. Donnell
Governor
State of Missouri
Jefferson City, Missouri

Your Excellency:

This is an acknowledgment of your letter of May 1, requesting an opinion from this office. The full text of such letter is as follows:

"Section 15086 of H. B. 74 of the Sixty-Second General Assembly in regular session (Laws of Missouri of 1943, page 644) reads in part as follows:

"* * * The compensation of the state service officer shall be twenty-four hundred dollars (\$2400.00) per annum with allowances for expenses of telephone, telegraph, travel, printing, binding, stationery, postage, and miscellaneous other expenses incidental to the operation of such office. * * "

"House Bill No. 28 of the Sixty-Second General Assembly in extra session repealed Section 15084, Revised Statutes of Missouri, 1939, and Section 15086, Laws of Missouri, 1943, pages 643 and 644, relating to the State Service Officer, his duties, authority, compensation, employees, assistants and expenses, and enacted in lieu thereof eight new sections to be known as Sections 15084, 15086, 15086 A, 15086 B, 15086 C, 15086 D, 15086 E, and 15086 F, relating to the same subject.

"Section 15086-A of said House Bill No. 28 reads as follows:

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"The salary of the State Service Officer shall not exceed the sum of \$3,600.00 per year, and the salaries of the assistants, attorneys, consultants, clerks, stenographers and employees shall be determined and fixed by the State Service Officer, subject to the approval of the Governor."

"Your opinion is respectfully requested on the following question:

"May the salary, of the person who is now and has been serving as State Service Officer since a period prior to the enactment of said House Bill No. 28, be increased to an amount which is more than \$2400.00 per annum?

"There is enclosed herewith copy of said House Bill No. 28."

Section 8 of Article XIV of the Missouri Constitution provides:

"The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

This provision applies to all officers who are elected or appointed for a definite term of office and whose compensation or salary has been fixed by statute. State ex rel. v. Smith, 87 Mo. 158; Givens v. Daviess County, 107 Mo. 603; Callaway County v. Henderson, 119 Mo. 32.

Section 15083, R. S. Mo. 1939, provides:

"That upon this article becoming effective the governor of the State of Missouri, by and with the advice and consent of the senate, shall appoint a state service officer, who shall have served in the military forces of the United States of America and who has been honorably discharged therefrom. That said officer shall hold office for a term of four years and shall be subject to removal by the governor for cause and said officer shall be under the adjutant general."

It will be noted that the state service officer under this section is appointed for a definite term of four years and is removable for cause and not merely at pleasure.

Section 15086, R. S. Mo. 1939, and as repealed by Laws of Missouri, 1943, page 644, provides the state service officer with a salary of \$2400.00 per annum. Section 15086A of House Bill 28 of the Sixty-second General Assembly in Extra Session, repealed Section 15086 and provided the state service officer with a salary of not exceeding \$3600.00 per annum.

The state service officer is clearly such an officer as would come within the inhibition of Article XIV, Section 8, above quoted. He has a definite term and is removable for cause. His salary therefore cannot be increased during his term unless he could be said to come within the exception, that where new duties are provided additional compensation may be allowed for those new duties.

It will be necessary to compare the duties under the former law with those under the new law to determine whether the situation here comes within the exception.

Section 15084, R. S. Mo. 1939, prescribes the duties of the state service officer as follows:

"The officer, immediately after his appointment, and each succeeding officer, shall familiarize himself with all laws, both federal and state, relating to the rights of ex-service men and their dependents. That said service officer shall disseminate among veterans of all wars living in the state of Missouri information concerning their rights under the laws of the United States and the rule and regulations of the United States veterans bureau; shall aid all veterans and their dependents residing in the state of Missouri in properly preparing, presenting and prosecuting their claims for compensation, pensions, insurance, hospitalization, rehabilitation, and all other matters in which they may have a claim for an award against the United States or any state, and shall prosecute said claims to conclusion, and shall aid the United States veterans bureaus in properly adjusting all such claims."

Section 15084 of House Bill 28, states his duties:

"The State Service Officer and all subordinates and employees of said State Service Officer shall familiarize themselves with all laws, both federal and state, relating to the rights of ex-service men and women, their legal representatives and dependents. The said State Service Officer shall aid and assist veterans of all wars, their dependents or their legal representatives. He shall promote and supervise the dissemination by all available means, information concerning the rights of veterans of all wars, their legal representatives and dependents, in the State of Missouri, under the laws of the United States and the rules and regulations of all the several United States veterans' bureaus, boards, commissions or other United States departments or authorities which are or may be in any manner concerned with the interest and welfare of veterans and their dependents; and shall aid and assist all veterans, their legal representatives and dependents, living in the State of Missouri, in preparing, presenting and prosecuting the claims of such veterans for compensation, pensions, insurance benefits, hospitalization, rehabilitation, and in all other matters in which they may have a claim against the United States of America or any State arising out of or connected with their service in the Military Forces of the United States of America, and in prosecuting such claims to their conclusion, when authorized and empowered to do so by such veterans, their legal representatives or dependents. The said State Service Officer shall, in his discretion, have the right to be designated as the attorney in fact by proper written powers of attorney executed by such veterans, their legal representatives or dependents, to accomplish the purposes in this act specified. He shall be authorized to accept, in carrying out the purposes of this Act, and for no other purpose, grants of services, personnel or money from any Federal agency, or any political subdivision of the state, or from any organization

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or volunteer agency desiring to participate in the work of said department. It shall be the duty of the State Service Officer and his assistants, to cooperate with the several offices of the United States Employment Service, the United States Veterans' Administration, and all other federal and state offices legally concerned with and interested in the welfare of veterans and their dependents. The State Service Officer shall accept and receive for distribution and shall distribute any federal or state funds which are available or may hereafter become available for veterans of the Military Forces of the United States of America, and if a bond be required as a condition to securing such fund or funds, the State Service Officer shall execute such bond or bonds as may be so required."

The provisions of the two sections are substantially the same as to duties. Under the new section the officer is empowered to accept money from the Federal government and other agencies to aid in carrying out the purposes of this act. It could hardly be said that this imposes a new duty upon the officer. It might even be argued that the new law somewhat restricts his duties. Under the former law the officer was bound to prepare, prosecute and present claims, and shall prosecute said claims to conclusion. Under the new section he must prosecute the claims to conclusion when authorized and empowered to do so by such veterans, their legal representatives or dependents.

It should also be pointed out that the compensation provided for by House Bill 28 merely says, "not exceeding \$3600.00." There is certainly no specific provision for additional compensation for additional duties or even any mandatory requirement that additional compensation be paid. In cases where the courts have held the exception to the constitutional provision to be applicable because additional duties were prescribed there was always a specific provision for additional compensation for that particular duty and not merely a provision for a general increase in salary. See State ex rel. v. Walker, 97 Mo. 162; Cunningham v. Ry., 165 Mo. 270; State ex rel. v. Sheehan, 269 Mo. 421.

Honorable Forrest C. Donnell

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CONCLUSION.

It is therefore the opinion of this office that the salary of the State Service Officer may not be increased during his present term to \$3600.00 under House Bill 28, Sixty-Second General Assembly in Extra Session.

APPROVED:

Respectfully submitted

ROY MCKITTRICK
Attorney General

ROBERT J. FLANAGAN
Assistant Attorney General

RJF:LeC

STATE BUILDING COMMISSION: Circumstances under which contracts
may be let on a fee basis.

May 10, 1944



Honorable Forrest C. Donnell
Ex-officio Chairman
State Building Commission
Jefferson City, Missouri

Dear Governor Donnell:

We are in receipt of your letter of May 4, 1944, as follows:

"Enclosed is copy of letter of April 26 from Keene and Simpson to myself. I request your opinion as to whether the work can legally be done by the employment of a responsible contractor on a fee basis."

The enclosure dated April 26, 1944, to which you refer, states as follows:

"Enclosed, two copies of an Agreement, providing for professional services to be rendered by us in connection with Repairs to the Psychiatric Clinic Building, State Hospital No. 4, Farmington, Missouri. This is drawn on the same basis and is similar in form to our agreement for professional services for repairs to the Custodial Buildings at Marshall, Missouri.

"At the meeting of the Commission on April 10, 1944, Mr. Keene explained the problems involved in specifying exact limitations of the extent of the work to be done in making repairs, and inquired if the work could legally be done by the employment of a responsible contractor on a fee basis. The work under such an arrangement would be considered as building repairs.

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"He is of the opinion that there was an expression by one member of the Commission that such a contract might be legally made. Is this correct? The method of letting a contract will determine the requirement of plans, specifications and other documents."

The question presented is whether the State Building Commission may employ a responsible contractor to make repairs to one of the eleemosynary institutions on a fee basis.

Section 6, Laws of Missouri, Extra Session, 1933-1934, page 110, provides the manner in which contracts shall be made by the State Building Commission for repairs to any one of the eleemosynary or penal institutions, in part, as follows:

"The commission is authorized and directed in the name of the State, by said commission, to make and execute, after said plan or plans shall have been adopted and approved as aforesaid, a contract or contracts in writing for the construction of said repairs, remodeling, rebuilding or construction of each of the improvements or additions to be made to any one of the said eleemosynary or penal institutions. A separate contract or contracts, in the discretion of the commission, may be made for the improvements of or additions to each of said institutions; or the commission may divide the work into appropriate classes and make separate contracts as to either of them, as it may deem most advisable and for the best interests of the State, and all contracts for the construction of any of said improvements, or additions, or for designated classes of the work thereof, shall be let to the lowest and best bidders therefor; but no contract or contracts shall be let to an amount in excess of the funds available therefor and any contract in excess of available funds shall be void. No work exceeding in amount the sum of One Thousand Dollars (\$1,000) shall be let unless sealed bids therefor be advertised in

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two daily newspapers of general circulation in this State, the first publication thereof to be not less than thirty (30) days before the day on which the bids are to be opened; all bids received by the commission may be rejected by it. * * *

The above statute is silent as to the type of construction contract that may be used in awarding a contract for repairs. It does state, however, that a contract must be let to the "lowest and best bidders."

In considering the purpose of this latter phrase, the Kentucky Court of Appeals in the case of R. G. Wilmott Coal Co. v. State Purchasing Commission, 54 S. W. (2d) 634, 1. c. 635, said:

"A study of this statute discloses that its underlying purpose is to encourage competitive bidding to the end that supplies for departments and institutions of the government may be secured at the most favorable prices. Obviously in enacting it, the Legislature had in mind the welfare of the public and not that of the individual seeking to sell supplies to the state."

In the case of Spiteaufsky v. State Highway Commission, 159 S. W. (2d) 647, 1. c. 651, the Supreme Court of Missouri, in construing a provision requiring a contract to be let to the lowest responsible bidder, said:

" * * * As stated in the Diamond case (89 Minn. 48, 93 N. W. 912, 61 L. R. A. 448),: 'The law is well settled that where, as in this case, municipal authorities can only let a contract for public work to the lowest responsible bidder, the proposals and specifications therefor must be so framed as to permit free and full competition. Nor can they enter into a contract * * * containing substantial provisions beneficial to him, not included in or contemplated in the terms and specifications upon which bids were invited. The contract must be the contract offered to the lowest responsible bidder by advertisement.' This is not new doctrine in Missouri.

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See United Construction Co. v. St. Louis,
334 Mo. 1006, 1020, 1021, 69 S. W. 2d 639,
646 (6)."

The purpose of the above statute is obviously to encourage public bidding so that the work may be done with the least possible expenditure of public funds.

To award the contract for repairs on a fee basis purely and eliminate competitive bidding for the work would be clearly violative of the purpose and the clear terms of the statute.

This should not be construed, however, as prohibiting the use of such common types of building contracts as "Cost--Plus" or "Cost--Plus--A--Fixed--Fee" contracts where the contractor is reimbursed for the costs of labor, materials, etc., by the owner and receives a fixed fee as his profit or gain. The determining factor is whether the contract provides for competitive bidding within the terms of the statute.

The statute further provides that "no contract or contracts shall be let to an amount in excess of the funds available therefor and any contract in excess of available funds shall be void."

To award a contract on a fee basis, without regard to the funds available, would also be directly violative of the terms of the above statute.

We are not advised as to the proposed amount to be spent for repairs, but we desire also to call attention to the fact that no work in excess of \$1000 may, under the statute, be let without advertisement.

CONCLUSION

From the foregoing, we are of the opinion that the State Building Commission may not employ a contractor to make repairs to one of the eleemosynary institutions on a purely fee basis unless (1) said fee to be charged by the contractor has first been determined by competitive bidding as being the lowest and

Honorable Forrest C. Donnell

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best bid and (2) the cost to the State will not be in excess of the funds available.

Respectfully submitted

MAX WASSERMAN
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

MW:HR

DEFICIENCY APPROPRIATIONS: Invalid when passed to satisfy claims arising out of a contract or agreement made in violation of the State Budget Act.

May 19, 1944



Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Your Excellency:

Recently you requested the opinion of this department, which request is as follows:

"A letter, dated July 30, 1943, addressed To the House of Representatives of the Sixty-Second General Assembly of the State of Missouri, from myself, which letter accompanied House Bill No. 657 of said General Assembly, reads in part as below quoted:

"Although there are approved the following items, namely:

- (a) the appropriation of the sums set forth in Section 6, aggregating Three Thousand Seven Hundred Eighteen Dollars and Ninety-One Cents (\$3,718.91);
- (b) the appropriation of the sum, set forth in Section 15, of Eleven Thousand Four Hundred Twenty-Two Dollars and Forty-Three Cents (\$11,422.43);
- (c) the appropriation of the sum, set forth in Section 18, of One Hundred Seventy-Two Dollars and Eighty-Eight Cents (\$172.88); * * *
- (e) the appropriation of the sum, set

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forth in Section 24, of Nineteen Thousand Five Hundred Forty-Nine Dollars and Ninety-Eight Cents (\$19,549.98);

(f) the appropriation of the sum, set forth in Section 43, of Thirty-Two Thousand Three Hundred Twenty-Three Dollars and Eighty-Nine Cents (\$32,323.89);

(g) the appropriation of the sum, set forth in Section 50, of Five Thousand Dollars (\$5,000.00),

"I have the assurance of the State Auditor that a warrant will not be issued by him for any part or all of the sum appropriated by any one of said Sections 6, 15, 18, 22, 24, 43 or 50 respectively until and unless either (a) it shall have been adjudged by the Supreme Court of Missouri that such warrant should be issued or (b) there shall have been delivered to the State Auditor the written opinion of the Attorney-General of the State of Missouri that, under the law, such part or all respectively of such sum so appropriated can be recovered by suit from the State of Missouri."

"Your opinion is respectfully requested on the following question:

"Can part or all respectively of the sums so appropriated by Sections 6, 15, 18, 24, 43 or 50 of said House Bill No. 657 be recovered by suit from the State of Missouri?"

The items mentioned are deficiency appropriations passed by the Sixty-Second General Assembly. Item (a) represents \$3,718.91 appropriated for the relief of certain officers and individuals for the apprehension of criminals; item (b) concerns an appropriation in the amount of \$11,422.43 for the purpose of paying accounts for the year 1940 of the State Cancer Commission Hospital; item (c) refers to an appropriation of \$172.88 to pay the accounts of the Embalming Board for 1942; item (e) relates to \$19,549.98 appropriated to satisfy defi-

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ciencies in connection with license plates; item (f) deals with an appropriation of \$32,323.89 for the relief of persons, firms and corporations because of cattle slaughtered as reactors to Bang's disease tests in the period commencing January 1, 1941, and ending December 31, 1942; and item (g) reflects an appropriation in the sum of \$5,000.00 for the relief of the city of Chillicothe, Missouri, for services rendered the State Industrial Home for Girls in that city in connecting its public sewer system with the private sewer service of such home. The total amount of the above items is \$72,188.09.

This department has heretofore ruled that the General Assembly may not effectively appropriate funds to satisfy contractual obligations incurred by a department or officer of the state at a time when there were not sufficient unencumbered cash balances in the treasury to the credit of the appropriated funds from which the obligations are to be paid, and by reason of the provisions of the State Budget Law (Article 1, Chapter 73, R. S. Mo. 1939) and Section 48 of Article 4 of the Constitution. The above ruling is represented by copies of opinions here enclosed.

This office on January 31, 1944, held that the deficiency appropriation to pay the tuition of certain negro students was valid because such tuition charges were not claims founded upon an agreement or contract. A copy of that opinion is likewise enclosed.

It is, therefore, apparent to us that the proposition submitted hinges upon the following two elements, namely, (1) do the appropriations in question seek to satisfy a claim based upon an authorized agreement or contract, and (2) if based upon such agreement or contract, were sufficient unexpended and unencumbered funds available by reason of an appropriation act sufficient to satisfy such contracts or agreements at the time of their creation?

If the appropriations in question are for the purpose of paying claims not authorized by the substantive law, then such appropriations fail by force of the constitutional provision regardless of the Budget Act. The authority for this statement may be found in the last mentioned opinion of this office. On the other hand, if the obligations are sanctioned by our law and not bottomed upon a contract or agreement, then such appropriation or appropriations would be valid irrespective of the Budget Act provisions. However, if the appropria-

tions seek to satisfy obligations prescribed by law but arising out of contracts or agreements, and if at the time such agreements or contracts were made there were not sufficient unexpended cash balances in the treasury to the credit of appropriated funds to satisfy such obligation or obligations, then the deficiency appropriations are of no effect.

An examination of the various statutory provisions respecting the various items mentioned in the request results in the conclusion that the respective obligations for which the questioned appropriations were enacted were authorized by the substantive law but grew out of contracts or agreements. The statutes are not here cited due to their number and length.

We are not unmindful that Section 8378, R. S. Mo. 1939, requires the Secretary of State to procure license plates from the Department of Penal Institutions. The Department of Penal Institutions is required to furnish such at a price that will not exceed the open market price and at not less than the manufacturing cost. Section 8988, R. S. Mo. 1939, requires the disposition of prison produced articles at a profit to the state. Thus the price for manufacturing license plates is set by a contract or agreement and the obligation sounds in contract.

Since two of the enclosed opinions were written, the Supreme Court of Missouri has had under consideration Section 48 of Article 4 of the Constitution. In the case of *White v. Jones*, 177 S. W. (2d) 603, that court in passing upon the rental of certain lands by the Board of Managers of the State Eleemosynary Institutions for a longer period than the life of the appropriation act, held such lease void, and ruled, 1. c. 606:

"Section 48 of Art. 4 of the Constitution of Missouri, relied upon by appellants, expressly prohibits the General Assembly from authorizing the payment of any claim hereafter created against the state under any agreement or contract made without express authority of law and provides that all such unauthorized agreements or contracts shall be null and void. While Section 14590, supra, expressly authorizes the state purchasing agent to negotiate leases, there is no express authorization for him to incur obligations for rentals or otherwise that will fall

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due and become payable after the lapse of two years from the date of the passage of the appropriation out of which said indebtedness is to be paid. The second clause of Section 48, Art. 4, forbids the payment of a claim under an illegal contract, meaning in this case any contract or lease entered into contrary to the terms and provisions of Sec. 9265, supra, and of Chapter 105, supra. See *Sager v. State Highway Commission*, 349 Mo. 341, 346, 160 S. W. 2d 757, 759."

The decision of *State ex rel. Averill v. Smith*, 175 S. W. (2d) 831, deals with an appropriation made to a board to pay claims incurred soon after its creation and at a time when it had no appropriation. The court held that the budget and purchasing agent's acts did not apply, but used the following language, l. c. 833:

" * * * No doubt, after sufficient time has elapsed to enable the board to comply with the time table set up by the budget act and the conflict disappears the board will come within its terms, but the budget act does not apply to the obligations here involved nor in any way affect their legality."

It may be contended that notwithstanding the provisions of the Constitution and the Budget Act, and inasmuch as the State received the benefit of supplies and services, a moral obligation exists to compensate therefor, and that the Legislature properly passed these deficiency appropriations to comply with that moral obligation.

The justification of moral obligation was urged in the case of *Donovan v. Kansas City*, 175 S. W. (2d) 874 (see 179 S. W. (2d) 108), wherein recovery was sought for supplies sold Kansas City in a manner that did not comply with its charter and statutory provisions. In passing upon this argument, the Supreme Court said, l. c. 883:

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* * * * The principle is not applied
when counter to paramount principles of
law. * * * *

The above cited cases apparently lend support to the views expressed by this department.

In the final analysis the problem is a question of fact, viz.: At the time of the creation of the claims now sought to be satisfied from the appropriation items in question, was there a sufficient unencumbered cash balance in an appropriation account out of which such obligations then could have been satisfied? If the answer is in the negative, then recovery cannot be had from the State.

Information secured from the Auditor's Office indicates that sufficient data does not exist in that office upon which the fact may be determined with certainty. The Attorney General does not know when the claims were incurred, and, of course, does not know what unencumbered cash balance, if any, existed in the various appropriation funds of the several offices and departments here involved at any particular time.

The difficulty confronting this office may be illustrated in the following manner: The Cancer Hospital deficiency appropriation involves items of equipment and supplies purchased in the 1939-1941 biennium. We cannot tell from the evidence at our command when the obligation to purchase any particular equipment was created, and we do not know if there was an unencumbered cash balance in the hospital's appropriation fund for that period out of which the obligation could have been paid at the time it came into existence. It may be that some of these obligations were incurred at a time when a sufficient appropriation fund existed, but that later created claims were preferred in payment and these exhausted the appropriation fund, leaving a valid claim unpaid.

The result is that this department is forced to content itself with merely furnishing the yardstick by which the facts are to be measured, that is, the formula by which the problem may be solved, dependent upon its factual elements.

May 19, 1944

CONCLUSION

It is the opinion of this department that if any of the claims or commitments covered by Sections 6, 15, 18, 24, 43 and 50 of House Bill 657 of the Sixty-Second General Assembly came into existence at a time when there were not sufficient unencumbered cash balances in appropriation funds then in the state treasury out of which such obligations, or any of them, could have been paid, then the amount of such obligation or obligations cannot be recovered by suit against the State of Missouri.

Respectfully submitted

VANE C. THURLO
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

VCT:HR

GEOLOGIST: May employ assistants on monthly salary basis, if salary is not in excess of daily maximum.

June 15, 1944.



Hon. Forrest C. Donnell,
Governor of Missouri,
Jefferson City, Missouri.

Dear Governor Donnell:

Your letter of May 23, 1944, presents for our opinion the following question:

May the state geologist appoint a necessary assistant to be compensated at the rate of \$225.00 per month?

Section 14888, R. S. Mo. 1939, provides:

"The state geologist may, with the approval of the board, appoint other necessary assistants whose pay shall not exceed seven dollars and fifty cents per day. He shall also have the power to negotiate for such chemical work, chemical apparatus, and chemicals as may be necessary, and may, from time to time, with the approval of the board, have such work done. He may also, with the approval of the board, employ special assistants in paleontology, provided it be deemed necessary, whose pay shall not exceed seven dollars and fifty cents per day."

The proposed compensation of \$225.00 per month evidently was arrived at by computing the pay on the basis of a thirty-day month. However, fixing the compensation on this basis would include Sundays and other days on which these assistants would not actually be engaged in the performance of functions assigned to them by the State Geologist. Thus the question presented requires us to determine whether the above section precludes a monthly salary and requires their compensation to be based on the number of days of actual work.

Ordinarily the words "per day" when used in connection with compensation means pay for a day's services. *Scroggie v. Scarborough*, 160 S.E. 596, 599 (S.C.). But we do not think such words are to be

given that connotation here. Section 14888 authorizes the appointment of assistants, but makes no definite prescription as to the term of the position. Section 14890, by granting the state geologist "full control over his assistants * * * (with) power to remove them when deemed necessary" necessarily makes the tenure of such assistants depend upon the pleasure of the geologist. In view of this, to consider the words "per day" in their ordinary significance would limit the tenure from "at the pleasure" to "from day to day." In *Colorado Telephone Co. v. Fields*, 110 P. 571 (N.M.) a contract with the City of Albuquerque provided that the telephone company would have a rate for "one party residence: \$3600. per annum". Under such contract the company contended the user must contract for the service on a yearly basis. The court held (quoting the syllabi):

"* * *the term 'per annum' should be construed to designate the rate of charge, and not to imply that subscribers must make contracts on an annual basis."

Applying this analogous ruling to our situation leads to the conclusion that the words "per day" do not limit the tenure of the assistants to the geologist to a day to day basis.

However, the idea of holding a position of indefinite tenure, coupled with the thought of being compensated for fulfilling the duties of the position only for the days actually worked, seems absurd. To say the least, it is highly illogical to have the compensation entirely unrelated to the tenure. We are informed that these assistants have been paid on a flat monthly basis since 1889 under this statute and its predecessor which provided for \$5.00 per day. In *Automobile Gasoline Co. v. City of St. Louis*, 32 S.W. (2d) 281, 283 (Mo. Sup.) it is said:

"The construction of a statute by those charged with the duty of enforcing it, when it has long prevailed, while not binding * * * is entitled to weight where the meaning is uncertain."

Again in *In Re Bernay's Estate*, 126 S.W. (2d) 209, 217 (Mo. Sup.) it is stated that such a construction -

"* * * should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

Beyond doubt this statute is uncertain in meaning, and we are not convinced that the construction acted upon is clearly wrong. Particularly are we not convinced, when to upset that construction will lead to an absurdity and will convict the Legislature of establishing a position of tenure with the compensation being unrelated to said tenure.

In view of this, we think the administrative construction long acted upon should be sustained and are of the view that the purpose of the language "whose pay shall not exceed seven dollars and fifty cents per day" as used in Section 14888 in fixing the compensation of these assistants was to fix the basis for computing the compensation and to place a maximum limitation thereon.

CONCLUSION

It therefore is permissible for the State Geologist, with the approval of the Governor, to fix the compensation of the other necessary assistants he appoints on a monthly salary basis, so long as the salary prescribed does not exceed \$7.50 per day for the period in which such assistants hold their positions.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

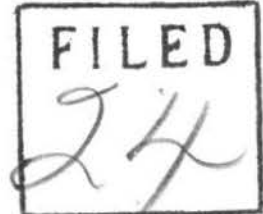
APPROVED:

ROY McKITTRICK
Attorney-General

LLB/LD

APPROPRIATIONS: Section 6, H. B. 657, Laws of 1943, page 278, in providing funds for relief of sheriffs who incurred expense without Governor's warrant is invalid.

June 21, 1944



Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

Your letter of June 10th, 1944, is as follows:

"Section 6 of H. B. 657 of the Sixty-second General Assembly (Laws of Missouri of 1943, page 278) appropriates out of the State Treasury, chargeable to the General Revenue Fund, designated sums for the relief of certain sheriffs, officers and persons and institutions for apprehension of criminals.

"Your opinion is respectfully requested on the following question:

Should the State Auditor issue warrants for the payment of those amounts, included in the appropriation in said Section 6, which are for payment of expenses incurred by sheriffs of Missouri who, without first having been appointed agents by the Governor of Missouri, left the State to return to Missouri certain alleged fugitives of Missouri?"

It is said in State ex rel. Kelly v. Hackmann, 275 Mo. 636, 205 S. W. 161, in a dissenting opinion, at page 654 (Mo.):

"* * * that no appropriation act under our system of laws derives any operative force from its own terms alone. * * *

something more is necessary to authorize the withdrawal of funds from the public treasury than a mere arbitrary declaration of the General Assembly for that purpose. * * * * *

That such is the established rule in Missouri is made certain by the rule laid down in State ex rel. Bybee v. Hackmann, 276 Mo. 110, 207 S. W. 64, where the point for decision was whether funds appropriated to cover stenographic services might be paid out if the agency incurring the obligation had no authority to employ stenographers. The Court ruled the case under the principle that (1. c. Mo. 116):

"* * * no officer in this State can pay out the money of the State except pursuant to statutory authority authorizing and warranting such payment. * * *"

In State ex rel. Bradshaw v. Hackmann, 276 Mo. 600, 208 S. W. 445, the point for decision was whether funds appropriated to pay for traveling expenses could be used to pay for travel expense incurred in traveling outside the state when the officer who incurred such expense was not authorized by law to travel outside the state. The Court denied the claim quoting at 1. c. Mo. 607 for its authority the above quoted excerpt from the Bybee case.

The appropriation in question purports to provide the necessary money to pay sheriffs who went to other states without the warrant of the Governor to return to Missouri persons charged with violating the laws of this state. No sheriff, or other officer of the State of Missouri, has any legal authority to do this. The method whereby these fugitives from justice are to be returned is prescribed in 18 U.S.C.A. 662, and Section 3976, et seq., R. S. Mo. 1939. None of the provisions referred to authorize the sheriff, as such, to go beyond the boundaries of the state to return a fugitive from justice. Only the messenger of the Governor who has the Governor's warrant is authorized to do this. It therefore appears that no substantive law authorized the sheriff to incur these obligations and that being so an appropriation to pay them is invalid.

CONCLUSION

It therefore is our opinion that the Auditor may not issue his warrants on the funds appropriated in Section 6 of House Bill 657, Laws of Missouri, 1943, page 278, to compensate sheriffs for their expenses and fees in returning fugitives from justice to this state when the expenses and fees were incurred at a time when the sheriffs did not have warrants from the Governor, and had not been designated as messengers of the Governor to serve such warrants.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

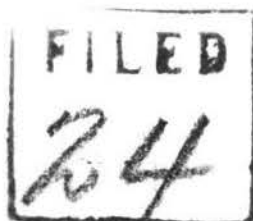
APPROVED:

ROY McKITTRICK
Attorney General

LLB:CP

CRIMINAL LAW:

Manner of executing death sentence on convict restored to sanity after sentence to death by hanging.



September 8, 1944

Honorable Forrest C. Donnell
Governor of the State of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

We have your letter of September 1, 1944,
in which you submit the following for our opinion:

"There is enclosed copy of (a) letter, dated February 12, 1935, addressed TO THE SECRETARY OF STATE, signed Guy B. Park, Governor, (b) letter, dated February 26, 1935, addressed SECRETARY OF STATE, signed Guy B. Park, Governor, (c) document, dated March 20, 1935, addressed TO THE SECRETARY OF STATE, signed Guy B. Park, Governor, (d) copy of letter, dated July 1, 1943, addressed to Ira A. Jones, President, Board of Managers, State Eleemosynary Institutions, Jefferson City, Missouri, signed C.C. Ault, M.D., Superintendent, (e) letter, dated July 3, 1943, signed Ira A. Jones, President, Board of Managers, addressed to myself and (f) letter, dated August 28, 1944, signed Ira A. Jones, President, addressed to myself.

"Your opinion is respectfully requested on the following question:

"What should be done in order to execute the sentence of Paul Barbata?"

Under Article 5, Section 8 of the Constitution of Missouri, the Governor is given power to grant reprieves, commutations and pardons, except in certain cases not material here. A reprieve has been defined by the Supreme Court of Missouri in the case of Lime vs. Blagg, 131, S.W. (2d) 583, 585, as follows:

"A reprieve 'is the withdrawing of a sentence for an interval of time whereby the execution is suspended.' 46 C.J. Sec. 5, p. 1183; 20 R.C.L. Sec. 3, p. 522. As further stated in the latter work, 'it is merely the postponement of the sentence for a time. It does not and cannot defeat the ultimate execution of the judgment of the court, but merely delays it.' With reference to the effect of a reprieve 46 C.J. Sec. 46, p. 1197, says 'A reprieve does not annul the sentence, but merely delays or keeps back the execution of it for the time specified. Consequently one who has secured reprieves is not exempted from arrest on the ground that the period of sentence has meanwhile expired. Nor can one who accepted a governor's reprieve from a jail sentence complain when such reprieve is revoked.'"

From the above, it is our opinion that the order of the Governor dated March 20, 1935, suspending the sentence of Paul Barbata was a reprieve. The problem in the case submitted by you is how to terminate the reprieve and carry out the death sentence.

Article 5, Section 8 of the Constitution of Missouri provides as follows:

"The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such condition and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons.
* * *

It will thus be observed that the Governor may grant a reprieve "upon such condition and with such restrictions and limitations as he may think proper". The reprieve under consideration was upon certain condition and contained certain restrictions and limitations in the following language:

"WHEREFOR, I Guy B. Park, Governor of the State of Missouri, by virtue of authority

in me vested by law, do hereby suspend the execution of said sentence of death until said Paul Barbata be restored to reason, and by these presents do order and direct the Sheriff of the City of Saint Louis to immediately convey said lunatic to State Hospital No. 1, located at Fulton, Missouri, there to be kept and detained until said Paul Barbata shall be restored to reason.

"AND the Superintendent of State Hospital No. 1, is hereby directed to receive said Paul Barbata from said Sheriff and him safely keep confined in said hospital and treat for insanity until restored to reason; when he, the said Superintendent, shall give due notice thereof to the then Sheriff of the City of St. Louis who shall proceed to execute said sentence upon such date as may be fixed by the Governor of the State of Missouri."

The reprieve was granted on condition that Paul Barbata be detained in State Hospital No. 1 for treatment, and was limited in duration until he was restored to reason. The said Barbata was not to be relieved of his sentence but the sentence was merely suspended until a certain situation came into being, to-wit, the restoration to reason of the convicted man.

Perhaps it may be asked as to how it shall be determined whether the convicted man has been restored to reason. Since a reprieve does not change the sentence of the convicted man in any way, but merely suspends his execution for a time, it is our opinion that the Governor has the right to revoke it. In the case of *Lime vs. Blagg*, *Supra*, the Supreme Court said: (l.c. 585):

"* * *Nor can one who accepted a governor's reprieve from a jail sentence complain when such reprieve is revoked."

Further, in said opinion the Court in holding that the Governor could revoke a "sick parole" said:

"* * * second, because the parole in this case was not a commutation, but a mere executive order, in the nature of a reprieve, which was subject to revocation in the Governor's discretion."

Section 4194 R. S. Mo. 1939, reads as follows:

"The inquisition of the jury shall be signed by them and by the officer in charge of said convict. If it be found that such convict is insane, the execution of the sentence shall be suspended until the officer in charge of such convict receives a warrant from the governor, or from the supreme or other court as hereinafter authorized, directing the execution of such convict."

By the foregoing section it is provided that the sentence " * * * shall be suspended until the officer in charge of such convict receives a warrant from the governor, * * *". Section 4195 R.S. Mo. 1939 reads as follows:

"The officer in charge of such convict shall immediately transmit such inquisition to the governor, who may, as soon as he shall be convinced of the sanity of the convict, issue a warrant appointing the time of execution, pursuant to his sentence; or, he may, in his discretion, commute the punishment to imprisonment in the penitentiary for life."

By the latter section it is provided that when the Governor shall be convinced of the sanity of the convict he shall issue a warrant appointing the time of execution, pursuant to his sentence. Nothing is said as to how the Governor shall satisfy himself as to the restoration of the convicted man to sanity. There is no requirement that a formal inquiry be held, or that the question be submitted to a jury. In the case of *Lime vs. Blagg*, *Supra*, the Court in discussing the parole which had been granted a convict, so that he could be treated for his illness, said:

" * * * Unquestionably the Governor had the right to determine further whether such treatment was necessary, or to end it. * * *"

Further, in the same opinion, the Court said:

" * * * *Ex parte Webbe*, 322 Mo. 859, 863, 30 S.W. 2d 612, 615 (1), holds 'the Governor is not confined to the statutory ground or

manner of revocation,' in view of his constitutional power, which would seem to indicate he has such power independent of statute. * * *

From the above we think there is no question but that the Governor can make the determination as to the sanity of the convicted man. He probably has such power by the Constitution alone, but in any event, he has such power by virtue of the Constitution and the Statutes together. In the case of State vs. Brockington, 162 S.W. (2d) 860, 862, the Supreme Court in discussing a case similar to the case at hand, said:

" * * *The statutes contemplate as did the warrant of the Governor committing Brockington to State Hospital No. 2 that those responsible for the receipt and restraint of Brockington at said Institution would give due notice of his restoration to reason to the Governor and otherwise comply with the laws and orders of the duly constituted State officials and tribunals to the end that the judgment and sentence of the court, temporarily suspended during Brockington's insanity, be carried into execution in accord with due process of law. * * *

Since the Governor now has reliable information that the convicted person in question has been restored to sanity, Section 4195, R.S. Mo. 1939, would require him to issue his warrent appointing the time for the execution of the sentence. However, another question has presented itself. Barbata was sentenced to death by hanging. It is now the law of Missouri that execution of death sentences must be by administration of lethal gas at the hands of the Warden of the State Penitentiary at Jefferson City, (Sections 4112 and 4113, R. S. Mo. 1939). The sentence as it appears in the Court record cannot therefore, be legally carried out in the manner directed by the Trial Court. In this connection attention is directed to Sections 4110 and 4111, R. S. Mo. 1939, which read as follows:

"Whenever, for any reason, any convict sentenced to the punishment of death shall not

have been executed pursuant to such sentence, and the cause shall stand in full force, the supreme court, or the court of the county in which the conviction was had, on the application of the prosecuting attorney, shall issue a writ of habeas corpus to bring such convict before the court; or if he be at large, a warrant for his apprehension may be issued by such court, or any judge thereof."

Section 4111.

"Upon such convict being brought before the court, they shall proceed to inquire into the facts, and if no legal reasons exist against the execution of sentence, such court shall issue a warrant to the warden of the state penitentiary at Jefferson City, Missouri, for the execution of the prisoner at the time therein specified, which execution shall be obeyed by said warden accordingly."

These two sections apply to the case in hand. (See: State vs. Brockington, Supra) Upon a hearing in such a proceeding, the Court could and should modify the judgment and sentence so as to provide for carrying out the death sentence by administration of lethal gas, as provided by Sections 4212 and 4213, Supra. Since the passage of the latter two sections, a number of cases have been before our Supreme Court wherein the defendants had been sentenced to death by hanging before said sections had been enacted. In all of them where the judgment was affirmed, the Supreme Court remanded the case with directions to the Circuit Court to modify the judgment and sentence so as to provide for carrying out the death penalty by administration of lethal gas. (State vs. Brown, 112 S.W. (2d) 568; State vs. Allen, 119 S.W. (2d) 304; State vs. Richetti, 119 S.W. (2d) 330; State vs. Kenyon, 126 S.W. (2d) 245.) In these cases the Supreme Court directed the Trial Court to cause the defendant to be brought before it and to pronounce sentence in accordance with what are now Sections 4112 and 4113, R.S. Mo. 1939. However, the Circuit Court had jurisdiction to modify the said judgment and sentence as directed. That is to say, the Supreme Court

September 8, 1944

did not and could not add to or enlarge the jurisdiction of the Trial Court by mere direction. By Article 6, Section 2 of the Constitution of Missouri, the Supreme Court is given appellate jurisdiction only, except in cases otherwise directed by the Constitution. No other provision of the Constitution is found which gives the Supreme Court power to confer jurisdiction on the Circuit Court, or enlarge the jurisdiction which it has. In all these cases the Supreme Court was merely exercising supervisory control over the Circuit Court in accordance with the provision contained in Article 6, Section 3 of the Constitution. The Supreme Court was merely directing the Circuit Court how it should exercise its jurisdiction in particular situations. We must, therefore, conclude that the Circuit Court has jurisdiction to modify the judgment in the Paul Barbata case without specific direction from the Supreme Court so to do.

In the Brockington case the Supreme Court did not say whether it would, under proper proceedings, modify the judgment and sentence to make them conform to the present law as to executing the death sentence, but we think the decision in that case is susceptible to the inference that it would have done so had proper preliminary proceedings been had. Further, in view of Section 4111, Supra, of the statutes, the Supreme Court is vested with jurisdiction to issue its warrant to the Warden of the State Penitentiary "for the execution of the prisoner at the time therein specified.". If that Court should issue its warrant, it would of course, direct the execution of the prisoner according to the law now in force, and hence it would, of necessity, have to modify the original judgment and sentence of death.

CONCLUSION.

It is, therefore, the opinion of this office that in the Paul Barbata case the following would be the proper steps to be taken to execute the sentence of death:

- 1) The Governor should issue a warrant appointing the time of execution pursuant to such modified sentence as the Circuit Court of the City of St. Louis, or the Supreme Court of Missouri may order.

September 8, 1944

2) The Prosecuting Attorney of the City of St. Louis, should thereupon proceed under Sections 4110 and 4111, R. S. Mo. 1939, to have the prisoner brought before one of the Courts named in Section 4110. Such Court would thereupon issue a warrant to the Warden of the State Penitentiary for the execution of the prisoner. Such Court would of necessity, have to modify the judgment and sentence so that said warrant would direct the execution of the death sentence in accordance with Sections 4112 and 4113, R. S. Mo. 1939.

Respectfully submitted,

Harry H. Kay
Assistant Attorney General

APPROVED:

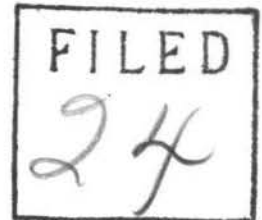
ROY McKITTRICK
Attorney General

HHK:lr

GOVERNOR :

Inspection of bonds enumerated in Section
13086 R.S. Mo. 1939 -- Power of State Officers
to delegate duty of inspection.

December 8, 1944



Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

Your letter of December 8, 1944, addressed
to General McKittrick, and in which you request an
opinion, has been referred to the writer for reply.
Your letter states:

"Section 13086 of the Revised Statutes
of Missouri of 1939 reads in part as
follows:

" * * * and the governor, attorney
general and state treasurer shall,
from time to time, inspect such bonds
and see that the same are actually
kept in the vaults of the state treas-
ury, or in the vaults of such banks or
bank, trust company or trust companies,
other than the bank or banks, trust
company or trust companies, selected
as the state depositories, as the gov-
ernor, attorney general and state treas-
urer may have duly agreed upon: * * *."

"Your opinion, as soon as possible is re-
spectfully requested on the following
question:

"Will compliance with the above quoted
portion of said Section 13086 be had if
(a) a person designated by the governor,
(b) the attorney general and (c) the
state treasurer shall, from time to time,

Honorable Forrest C. Donnell

December 8, 1944

inspect such bonds and see that the same are actually kept in the vaults of the state treasury, or in the vaults of such banks or bank, trust company or trust companies, other than the bank or banks, trust company or trust companies, selected as the state depositories, as the governor, attorney general and state treasurer may have duly agreed upon?"

Article 2 of Chapter 87, R.S. Mo. 1939, deals generally with the subject of depositories of State money. Section 13086 specifies the character of bonds required for the security of State funds deposited by the State Treasurer under Articles 1 and 2 of Chapter 87 aforesaid, and enumerates and specifies what bonds shall be taken for such purpose.

Your particular inquiry is whether compliance with that part of Section 13086 quoted in your letter calling for an inspection of the bonds deposited for such security if:

"(a) a person designated by the governor, (b) the attorney general and (c) the state treasurer shall, from time to time, inspect such bonds and see that the same are actually kept in the vaults of the state treasury, or in the vaults of such banks or bank, trust company or trust companies, other than the bank or banks, trust company or trust companies, selected as the state depositories, as the governor, attorney general and state treasurer may have duly agreed upon?"

The inspection of the bonds has nothing to do with the selection of the bonds or their worth or value as security. The inspection of the character, identity and number of any of the bonds enumerated in Section 13086 would be a ministerial act involving no exercise of discretion, and may be delegated.

40 C.J., page 1210, paragraph 5, gives the following definition of a ministerial duty:

"A ministerial duty has been variously defined as a duty in which nothing is left to discretion; a duty performed by one acting under superior authority, or not with unlimited control; a simple,

definite duty, arising under conditions admitted or proved to exist, and imposed by law; an absolute and imperative duty, the discharge of which requires neither the exercise of official discretion nor judgment. * * *

46 C.J., page 1063, states the rule that ministerial duties may be delegated in the following language:

"Without statutory authority, deputies have no power with respect to the duties of an office involving the exercise of judgment and discretion, but all ministerial duties pertaining to the office which the principal could perform may be performed by a deputy. * * *

In the case of State ex rel. V. Hudson, 226 Mo. 239, l.c. 265, a ministerial duty is defined as follows:

"In State of Miss. v. Andrew Johnson, President of the United States, 4 Wall. l.c. 498, a ministerial duty enforceable by a court through a writ of mandamus was thus defined: 'A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted, or proved to exist, and imposed by law.'"

And in the case of State ex rel. v. Meier, 143 Mo. 439, at l.c. 447, the Court quoted and adopted the following definition of a ministerial act:

"* * * 'A ministerial act is one which a public officer is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed.' Merrill

on Mandamus, sec. 30; Marcum v. Com'rs.,
42 W. Va. 263, and cases cited."

Corpus Juris lays down the rule that at common law, public officers may appoint deputies for the discharge of ministerial duties. And we have no statute to the contrary in Missouri. This text is found in 46 C.J., page 1062, paragraph 380, which is as follows:

"* * * At common law, however, public officers may appoint deputies for the discharge of ministerial duties, * * *"

It is well settled that the performance of purely ministerial functions can be delegated to others to be performed. This was a principle of the common law and has been followed in the decisions in this and other states.

In the early case of Hunter v. Hemphill, 6 Mo. 106, the Court, at l.c. 21, said:

"* * * Before that question could be determined, it would be necessary to look into the nature of the act which was to be performed, if a mere clerical act, it might have been performed by deputy; if a judicial act, and the register does, for some purposes, and in some matters, act as a judicial officer (as in granting pre-emptions) the act could not have been performed by deputy. ** "
(Underscoring ours)

And in the case of Small v. Field, 102 Mo. 104, in passing upon the right of a clerk of a court to appoint a deputy where no statutory authority was found, the following quotation is found at l.c. 119:

"The office of clerk of a court seems to be one which, from its nature and constitution, implies a power or right to execute it by deputy. Whenever nothing is required but superintendency in office a ministerial officer may make a deputy. 7 Bac. Abr. 316,

317, - - Tit. Offices and Officers. And the rule is general that a deputy may do every act which his principal might do. Com. Dig. Officers, D. 3; Confiscation Cases, 20 Wall. 92."

In the case of State ex rel. v. Reyburn, 158 M. A. 172, a case in which mandamus was granted against a county clerk to compel him to permit the examination of the books and papers in his office by an accountant employed by one member of the County Court, the St. Louis Court of Appeals, said, at l.c. 176-177:

"The matter of inspecting the books and papers of the clerk's office is purely ministerial and in no respect judicial in its character. It is therefore entirely clear that the law does not devolve it as a personal duty upon a judge of the county court which he may not delegate to another who is competent to perform such a task, especially when it appears the judge himself is from any cause unable or incapacitated to effectually discharge it. But that matter is unimportant, for the judge might cause the investigation to be made by expert accountants or others of his choosing though he were entirely competent himself. The principle announced in State ex rel. Johnson v. Transit Co., 124 Mo. App. 111, 100 S. W. 1126, is equally relevant here."

In the matter submitted, the propriety of the appointment by the Governor and State Treasurer of other persons to perform such ministerial duties as the inspection of the bonds mentioned in Section 13086 R.S. Mo. 1939, the above citations from 46 C. J. page 1062, paragraph 380, the case of Hunter vs. Hemphill, Supra, cited under said Section of Corpus Juris, and the case of Small vs. Field, Supra, constitute sound legal authority to permit the Governor and State Treasurer to so designate some person, under the common law, to represent each of them respectively in the performance of such ministerial duties. The Attorney General has authority under Section 12902, R.S. Mo. 1939 to appoint certain Assistants who are given the power by statute, "to represent him in all trials and proceedings in which he may be required to appear or participate. * *"

Honorable Forrest C. Donnell -6-

December 8, 1944

CONCLUSION.

Considering the nature of the duty to inspect the bonds in the vaults enumerated in that part of Section 13086 R. S. Mo. 1939, quoted in your letter, and following the above cited and quoted authorities, it is the conclusion of this Department that the Governor, the Attorney General and the State Treasurer have the authority to delegate to some other person or persons the duty of making the inspection required in that part of Section 13086 quoted in your letter.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

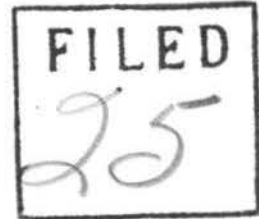
APPROVED:

VANE C. THURLO
Acting Attorney General

GWC:lr

ASSESSORS: May appoint deputy to be paid out of the fees allowed to such assessor.

June 27, 1944



Honorable John W. Dugan
Judge 2nd District
Herculaneum, Missouri

Dear Judge Dugan:

This is an acknowledgment of your opinion request addressed to the General on June 24, 1944, which is as follows:

"The assessor of this county is having difficulty in securing deputies to assess property.

"We pay the assessor thirty-five cents for each list, and out of this he must pay his deputies.

"Is there any way in which we may pay the assessor or his deputies an additional amount?"

Section 10946, R. S. Mo. 1939, is as follows:

"Every assessor shall take an oath that he will faithfully and impartially discharge the duties of his office, and that he will assess all the property in the county in which he assesses at what he believes to be its actual cash value. And every assessor may appoint as many deputies as he may find necessary, to be paid for out of the fees allowed to such assessor, for whose official acts he shall be responsible, and who shall take the same oath and have the same power and authority as the assessor himself, while employed as such deputy or deputies."

Such statute provides for the payment of the deputy assessor, for his services in such capacity, out of the fees allowed the assessor. We find no other statute providing for such payment in any other manner

In regard to such question the Supreme Court in the Case of Maxwell v. Andrew County, 146 S. W. 2d 621, 625, held:

"It is well established law that the right of a public officer to be compensated by salary or fees for the performance of duties imposed on him by law does not rest upon any theory of contract, express or implied, but is purely a creature of the statute. Gammon v. Lafayette County, 76 Mo. 675; State ex rel. Evans v. Gordon, 245 Mo. 12, 149 S. W. 638; Sanderson v. Pike County, 195 Mo. 598, 93 S. W. 942; Jackson County v. Stone, 168 Mo. 577, 68 S. W. 926; State ex rel. Troll v. Brown, 146 Mo. 401, 47 S. W. 504; Bates v. City of St. Louis, 153 Mo. 18, 54 S. W. 439, 77 Am. St. Rep. 701; Williams v. Chariton County, 85 Mo. 645.***"

He who accepts public office takes the office cum onere. The fact that in performing duties incident to the office would incur a hardship is a matter for the consideration of the legislature. Such rule was stated in the Case of State ex rel. Buder v. Hackmann, 305 Mo. 342, 351, in the following language:

"The argument of hardship and that an officer should not be compelled to incur a financial loss, in performing the duties incident to his office, cannot be considered by the courts in passing upon the rights of relator, as fixed by the statute. Failure to provide a salary or fee for a duty imposed upon an officer by law does not excuse his performance of such duty. (State ex rel. v. Brown, 146 Mo. 1.c.406.) It may be that an assessor actually sustains a financial loss in the performance of his duties under our State Income Tax Law. But such fact is for consideration by the Legislature, and not by the courts.

"In view of what we regard as the plain provision of the statute that clerk or deputy hire shall be paid by the assessor out of

Hon. John W. Dugan

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June 27, 1944

the fees received by him, the cases of Ewing v. Vernon Co., 216 Mo. 681, and Harkreader v. Vernon Co., 216 Mo. 696, cited and relied upon by relator, need not be discussed."

CONCLUSION

It is the opinion of this department that in as much as the only compensation allowed an assessor of your county is certain fees fixed by the legislature, such compensation may not be increased by the county court.

Respectfully submitted,

SVM:EH

S. V. MEDLING
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

- COURT JUDGES:
- 1) Associate Judge must be a resident of district in order to qualify; voluntary departure from district works a forfeiture of office.
 - 2) Sections 2475 and 1988, R.S.Mo. 1939 construed.

January 27, 1944

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| FILED 26 |
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Honorable J. R. Eiser
Prosecuting Attorney
Holt County
Oregon, Missouri

Dear Mr. Eiser:

We are in receipt of your request for an opinion from this Department, under date of November 29, 1943, which request reads as follows:

"At your early convenience, I would appreciate your opinion on the following question, to-wit:

"One of our County Judges who represents the First or south District in the county is a resident of said district, but has purchased a farm in the Second or North District of the county and proposes to move to said farm in the near future. I would like to know if a change of residence from the District in which said County Judge now resides and represents, to the district which he does not represent will disqualify him to hold said office of County Judge representing the First or South District.

"Thank you for your courtesy in this matter."

In order to answer the question presented in your opinion request we think it advisable to first set forth the pertinent statutes, together with some observations that must be made to the end that we may arrive at the correct interpretation of the Law. First, we quote Section 1988, which is contained in Article 1, Chapter 10, R. S. Mo. 1939, which Article is entitled "General Powers and Duties" and Chapter 10 of the Statutes, supra, has to do with "Courts of Records". Said Section reads as follows:

"Qualifications of Judges.

Every judge of the supreme court and of the several courts of appeals shall be a citizen of the United States, not less than thirty years old, and shall have been a citizen of this state five years next preceding his election or appointment, and shall be learned in the law. Every judge of the circuit court shall be not less than thirty years of age, shall have been a citizen of the United States for five years, a qualified voter of this state for three years next before his election or appointment, and shall be learned in the law. Every judge of probate and of a county court shall have attained the age of twenty-four years, and shall have been a citizen of the United States five years and shall have been a resident of the county in which he may be elected for one year next preceding his election; and every judge of any court of record shall be commissioned by the governor, and, whether elected or appointed, shall hold his office until his successor is elected and qualified."

In tracing the history of this section we find that it first appears in the Revised Statutes of Missouri in the year 1825 at page 268, paragraph 2, and contains the same wording as the now present section with the exception that in 1909 the Legislature amended what was then Section 1578, Revised Statutes of 1899, (see the Laws of 1909, page 391) and added at the end of the section the words:

"* * *and, whether elected or appointed, shall hold his office until his successor is elected and qualified." "

and substituted in the first line of the text the word "several" for the words "St. Louis and Kansas City". This section as it now stands in the statutes sets up the qualifications of judges and if no other statute or specific wording can be found in the statutes to take precedence over this section through statutory construction, then we would be driven to the immediate conclusion that the County Judge referred to in your opinion request if he had attained the age of twenty-four years, was a citizen of the United States five years preceding his election or appointment to the office of county judge, and was a resident of the county in which he was elected or appointed for one year next preceding his election (or appointment), then the fact that he moved out of the particular district would not

disqualify him for your opinion request presupposes that he would remain a resident of the county, and therefore, did meet the qualifications as set up in this section even though he was not living in the geographical area containing the voters who by casting their votes, elected him to the office. Having thus set forth our views as pertain to this section, we next wish to call attention to Section 2474 and Section 2475, R. S. Mo. 1939, wherein we particularly noted that two sections are contained in Article 13 of Chapter 10, which article is entitled "County Courts." Section 2474 reads as follows:

"The county court shall be composed of three members, to be styled judges of the county court, of whom the probate judge may be one, and each county shall be districted by the county court thereof into two districts, of contiguous territory, as near equal in population as practicable, without dividing municipal townships."

We wish to point out that this section was passed in its present form in 1877 (see Laws of 1877, Section 1, page 226). We shall not dwell upon this section for mere reference to it we feel is sufficient and there is no question raised about power of the Court to district the County. We next quote Section 2475, as it now appears in the Revised Statutes of Mo. 1939:

"At the general election in the year eighteen hundred and eighty, and every two years thereafter, the qualified voters of each of said districts shall elect a county court judge, who shall hold his office for a term of two years and until his successor is duly elected and qualified; and at the general election in the year eighteen hundred and eighty-two, and every four years thereafter, the presiding judge of said court shall be elected by the qualified voters of the county at large, who shall hold his office for the term of four years and until his successor is duly elected and qualified. Each judge elected under the provisions of this article shall enter upon the duties of his office on the first day of January next after his election."

Upon a study of the history of the last section supra, we find that it was enacted by the Legislature in 1877, (see Section 2, Laws of Missouri 1877, page 226) and we here

again quote the section as it was enacted:

"At the general election in the year 1878, and every two years thereafter, the qualified electors of each of said districts shall elect and be entitled to one of the judges of the county court, who shall hold their offices for the term of two years, and until their successors are duly elected and qualified, and at said election, and every four years thereafter, the other judge of said court shall be elected by the qualified electors of the county at large, who shall be president of the court, and shall hold his office for the term of four years and until his successor is duly elected and qualified; Provided, That the judges of the county court, elected under the provisions of this chapter, shall enter upon the discharge of their duties on the first day of January next after they shall have been elected and qualified according to law."

It will be noted that we have underlined certain words in the above quoted section, and on comparison with Section 2475 as it now appears in the Revised Statutes of Mo. 1939, that said section does not contain the underlined words. We find that these words were deleted in the Revised Statutes of 1879 (see Section 1194 R. S. Mo. 1879), and it will be noted that the wording as it appears in that statute has prevailed to the present time, or for a period of sixty-five years. Now we must conclude that unless Section 2 of the Laws of 1877 as we have underlined, were deleted by Legislative action in the form of an amendment or otherwise, then those words are still as much a part of the Section 2475 R. S. Mo. 1939, as they were the day that Section 2, Laws of 1877 became effective as the Law. Bowen vs. The Mo. Pac. R'y. Co. 118 Mo. 541, 1.c. 548:

"* * *The statute rolls in the office of the secretary of state are the primary and best evidence; and, as it appears from an examination of them that the two sections in question were not re-enacted, there is nothing left for us to do but declare them invalid, void."

We have endeavored to make an investigation to determine by what authority, if any, the words that were contained in Section 2, Laws of Missouri 1877, page 226, supra, were deleted from Section 1194 R. S. Missouri 1879, when it will be noted

that at the bottom of Section 1194, Supra, there is contained in parenthesis "Laws 1877, p. 226, Section 2, amended". Upon review of the original roll in the Secretary of State's office we were unable to find any legislative action showing a repeal or an amendment of Section 2, supra. However, on reading the preface of the Revised Statutes of Missouri, Volume 1 for the year 1879 in which volume is contained Section 1194, supra, we find this wording:

"Under this system, all of the more important subjects in the statutes and session acts were carefully revised and reported, and passed as other bills in the course of ordinary legislation. But as this mode of revision was necessarily tedious and expensive, by reason of the large amount of printing it imposed, those acts which, in the judgment of the General Assembly, required no changes or amendments were left undisturbed."

We take it from this wording that possibly the Legislative Committee re-worded Section 2, Laws of Missouri 1877 when they were preparing the Revised Statutes of 1879 in Revision Session, so that it read as is contained in Section 1194, R. S. 1879. If these words were deleted with the intention of taking from the section the meaning that they would give to the section as they were contained therein, then we would be bound to reach a different conclusion than if on the other hand the Legislative Committee took the view that the words were superfluous. We are inclined to this latter view for reasons hereinafter set forth, and for the additional reason that the Legislative Committee no doubt were prompted in the first instance to change this section because Section 2 started out "at the general election of 1878 and every two years thereafter * * *" and in order to modernize the section in the revision they started the section " at the general election in the year of 1880 and every two years thereafter* * *" and in the body of the section which had to do with the judge elected at large, they inserted the wording "* * *and at the general election in the year of 1882 and every four years thereafter* * *". Of course, bearing in mind that the Revision Session was in 1879, and we do not believe that there was any deliberate intention to anyway interfere with those county judges who were then holding office as county judge in the several counties in the State of Missouri at that time. We have been unable to find any case in Missouri wherein the Court has passed upon this section. Therefore, we have no guide

except the general rules of statutory construction which we hereinafter set forth in stating our position in determining what is the meaning of Section 2475 R. S. Mo. 1939, which is the same as Section 1194, R. S. Mo. 1879.

A further question immediately springs forth and that is if the Revisionary Committee purposely deleted the words "and be entitled to one of the judges of the county court" then did they intend that the section as they wrote it should mean that "the qualified voters of each of said districts shall elect a county judge" (section 2475) but said district should not be entitled to one of the judges? Or, did they mean that said district should not necessarily be entitled to one of the judges? We do not adhere to the interpretation that any such intention was in the minds of the Revisionary Committee for we believe that such an interpretation would defeat the purpose of the intention of the act for it is said in the case of State v. Miller, 318 Mo. 581; 300 S. W. Page 765, l.c. 767:

"* * * We cannot assume that the lawmakers intended to give the word a meaning which would defeat the purpose of the act.* * *

We wish to further call attention to the case of State ex rel. Ernest E. Smith vs. Thomas, 220 S. W. 702; 203 Mo. App. 452, l.c. 457, wherein the court said:

"* * * In this situation it is proper to ascertain the intention of the Legislature which framed the statute. (Sedgwick on Construction of Statutory and Constitutional Law (2 Ed.), p. 194; State ex rel. v. Little River District, 271 Mo. 429, 436,) where it is said, 'It is elementary that statutes should be so reasonably construed as to give them their intended force and effect;' Gum v. St. L. & S. F. Ry. Co., 198 S. W. , 494, 496, where it is said; 'In the interpretation of an amended statute, the state of the old law and mischiefs arising thereunder are to be considered.)"

And again in the case of Wallace vs. Woods, 102 S. W. (2d) page 91, l.c. 95, paragraph 9-11 the court said:

" ' The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to

promote its object, and "the manifest purpose of the statute, considered historically," is properly given consideration.* * * 2 Lewis, Sutherland on Stat. Const. (2d Ed.) section 363; Endlich on Interpretation of Statutes, Section 329; and Maxwell on Statutes (5th Ed.) 425.' "

therefore, upon the rules laid down in the cases, supra, together with the historical setting of Section 2475 and in view of the fact that the section would be susceptible of a nullifying interpretation if the deleted words were disregarded and a converse effect given, because of the fact that they were deleted, it is our view that the deleted words "and be entitled to one of the judges of the county court" was because of an oversight on the part of the Revisionary Committee or because they were deemed superfluous by the Committee.

We wish to further point out that down through the years since 1877, the general practice has been adhered to that the judge elected by one of the several districts of the county designated through the authority imposed in Section 2474, has been a resident of the geographical area from which he is elected, and we note from your opinion request that this condition was fully met by the judge who is now contemplating moving out of the geographical area. It is our view that Section 2475 as it now reads, makes it incumbent upon the person elected from the geographical area to be a resident of that area as a condition precedent before he could qualify as a county judge to represent that district. We reason this not only from the wording of Section 2475, or from the history of the section, but from the further fact that at the same time he is elected, the other district is also electing a person who shall represent his particular district, and the voters of each district at the election vote with the purpose in mind to place on the county court bench, a person who will represent the district from which he is elected. We shall not dwell on the remoteness and the urgent need for a first hand understanding of the conditions of each particular land owner in the county in the year 1877 and subsequent years, but one is not so far removed at the present time not to realize that if the interpretation and the meaning of the wording of the section 2475 was to be different, in that two persons could legally be elected to the county court bench from the same geographical area, and for example, each from the extreme end of the county, how little representation would have been enjoyed by those persons living in the opposite extremities of the county in the other geographical area. So Section 2475 in our

opinion, can have but one meaning namely; that an urgent need existed in 1877 as it does at the present time; that first hand information is necessary as to the needs of the geographical area as pertains to their roads, bridges and other multiplicity of needs of the citizenry of the geographical area which could only be equally enjoyed unless a county was divided into districts as is provided in Section 2474, giving each district representation with a further precaution that a third person should be elected at large or by the combined votes of an electorate of the whole county. We think our position thus stated is sustained by the case of Straughan vs. Meyers, 268 Mo. 580, 1.c. 591:

"* * * In construing statutory provisions the object and purpose which induce their enactment and the mischief they are intended to prevent must be given effect (Spitler v. Young, 63 Mo. 42), as must also the results and consequences of a proposed interpretation. (Glaser v. Rothschild, 221 Mo. 1.c. 210)"

Of course the purpose of the judge elected at large was to provide a balancer or stabilizer on the county court. This is borne out through the fact that he serves for a term of four years whereas the associate judge serves only for a term of two years, and further, because of the fact that he is elected at a different time, or two years after they are elected and has the duty of presiding over the body.

Thus, we determine that Section 2475 is a section setting up the manner of election of the county judges and further guaranteeing to the citizenry of a particular county a form of representation, whereas as we pointed out in the first part of this opinion, Section 1988, supra, is a general section solely for the purpose of stating the conditions that shall be met by a person who seeks to be a judge of one of the Courts of Record. We do not consider that there is any inconsistency because of the fact that Section 2475 requires a person to be a resident of the particular district from which he is elected. Not that provisions can be found in the statutes in so many words, but as we have pointed out, the electorate of a particular district has the right to that type of representation. In other words, as far as a person's qualifications are concerned, he must be a resident of the county whereas the persons of a particular district are entitled to require such person to also meet the further qualification that he must be a resident of their particular district, and such additional qualification does not come because it is set forth in Section 1988, but because of the fact it is our view the wording of Section 2475 fully gives the residents of a particular district this right

and said section is special in character wherein it requires that a judge elected from one of the districts shall be a resident of said district. In this connection we wish to call attention to a general rule of statutory construction which may be found in the case of State ex rel. Equality Sav. & Bldg. Ass'n. v. Brown, 68 S. W. (2d) 55, 1. c. 59; 334 Mo. 781, which reads as follows:

"* * * where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication." (Numerous cases cited.) If there be any repugnancy between these two statutes, the general statute, section 4566, must yield to the special statute, section 5613."

Having thus set forth our views we must conclude that if a person, as is designated in your opinion request who was duly elected and qualified from a particular district in accordance with the text of Section 2475, as the person referred to in your opinion request no doubt did, then it is our view that when such person voluntarily leaves the confines of the geographical area of his district the residents of that particular district lose the representation which is guaranteed to them by Section 2475, putting them in a position where they may have grounds to have a legal forfeiture declared of the office of the judge representing their respective district. We say this notwithstanding the fact that such person may still be a resident of the county in compliance with Section 1988, but wish to make this clear that that section sets forth the general qualifications of a person who seeks to be Judge of a Court of Record, whereas Section 2475 is special in character, guaranteeing unto the residents of the particular district the right of representation from their particular district.

For further authority to sustain our position we quote from the following authority:

In the case of Barre v. Greenwich (1822) 1 Pick. (Mass.) 129, the court said:

"* * * Besides, it must be conceded, as a general principle, that where the legislature has provided that certain offices

shall exist in any particular community, the members of that community are alone eligible to those offices; they are in fact the representatives of that community, in that department of municipal government which they are appointed to discharge. That community alone are judges of the qualifications of such officer, and can alone command his services. It would seem to follow that when he ceases to be a member of the community, he ceases to be its officer."

This involved the question whether the removal of a town constable and tax collector to another town in the state had the effect of forfeiting his office.

"It was admitted by all parties in State ex rel. Malloy v. Skirving (1886) 19 Neb. 497, 27, N. W. 723, that a statute providing for a board of county commissioners consisting of three persons having the qualifications of electors, who should be 'elected in their respective districts,' and that 'one commissioner shall be elected from each of said districts by the qualified voters of the whole county,' required that a person elected county commissioner be a resident of the district at the time of his election; proceeding upon which assumption, it was held by the court that the removal of a commissioner from his district after his election had the effect of vacating his office, under a statute providing that any civil office should be vacant upon the holder's ceasing to be a resident of the state, district, county, township, precinct, or ward in which the duties of his office were to be exercised or for which he was elected."

"Attention is called to State ex rel. Johnston v. Donworth (1907) 127 Mo. App. 377, 105 S. W. 1055, involving the effect of the removal of an

January 27, 1944

alderman from the ward for which he was elected after his election and qualification, under a statute providing that no person should be an alderman unless he was a resident of the ward from which he was elected, in which the court said: 'Defendant's counsel say that the statute is ambiguous. Conceding for argument's sake that it is, it ought to be interpreted in the light of the legislative policy, if that can be ascertained; that is to say, we ought to attempt to realize the purpose of the legislature. We conceive that this purpose and policy is to establish ward representation in the boards of aldermen of cities of the fourth class; each ward of such city to be represented by two residents familiar with the needs of the ward and whose interests are identical with the interests of the ward community It is true that the aldermen act for the welfare of the city generally and pass ordinances which relate to the entire city; but it is also true that they represent in an especial manner their particular wards.' "

"In *People v. Ballhorn* (1902) 100 Ill. App. 571, in which the statute expressly required that an alderman should reside within the ward for which he was elected, the court stated: 'Sound public policy requires that those who represent the local units of government shall themselves be component parts of such units. The purpose of these statutes is to effectuate this wise policy. And this purpose can only be truly served by requiring such representatives to be and remain actual residents of the units which they represent, in contradistinction from constructive residents.' "

(The aforementioned cases were taken from 120 A.L.R., page 669, and other cases may be found in said citation.)

CONCLUSION.

1) It is the opinion of this Department that Section 2475 R. S. Mo. 1939 guarantees unto the residents of the geographical area set up under Section 2474 for the election

Honorable J. R. Eiser

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January 27, 1944

of an Associate County Judge, the right to have the Associate Judge be a resident of the district from which they elect him, and if such judge after being duly elected and qualified under Section 2475, voluntarily leaves said district, the citizens of said district thereby lose the right to representation, as is guaranteed by Section 2475, supra.

2) It is the opinion of this Department that Section 1988, R. S. Mo. 1939, which sets forth the general qualifications of a person who seeks to be judge of a Court of Record, that said section applies to such person solely and does not take precedence over a special section which guarantees rights to the citizens of a geographical area, even though such section in truth and fact places an additional qualification upon such person holding judgeship.

Respectfully submitted,

E. Richards Creech
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

ERC:lr

2
John
SCHOOLS. : Board of Regents of State Teachers
: College may lease facilities of
: college for joint use with Army
: Hospital.

August 15, 1944

Mr. Roy Ellis, President
Southwest Missouri State Teachers College
Springfield, Missouri

8-24
FILED
26

Dear Mr. Ellis:

This will acknowledge the receipt of your letter of August 11, 1944, requesting an opinion of this office, which is as follows:

"Pursuant to the telephone request made to Mr. Vance C. Thurlo of your office by Mr. Frank C. Mann, our Attorney, to-day, we will appreciate your giving your opinion on the right of the Board of Regents to enter into a contract with the United States for leasing a portion of our buildings and equipment under the following conditions.

"The Government is requesting the Board of Regents to lease to them approximately the west half of our campus which includes the cafeteria in the Administration Building, The Field House, the Athletic Field, the joint use of our swimming pool, and other grounds and facilities for the use of O'Reilly General Hospital, the Army Hospital located in Springfield, as a convalescent hospital for soldiers who are now patients at O'Reilly General Hospital. They require your opinion as to the authority of the Board of Regents to enter into such a lease, which authority is clearly granted under the provision of Article 20, Chapter 72, Revised Statutes of 1939.

"I might add that due to the war conditions the school has no need for the facilities the Board proposes to lease to the Government, and it is contemplated that the lease will continue during the duration or probably six months thereafter.

"Four executed copies of your opinion are required by the War Department; therefore, I will appreciate it if you will send me four executed copies

of your opinion when it is ready."

Section 10753, R. S. Mo., 1939, provides:

"The boards of regents now constituted and appointed for the first, second, third, fourth and fifth district normal schools and for Lincoln institute are hereby created boards of regents for the first, second, third, fourth and fifth state teachers colleges and for Lincoln university with full succession to property and powers. Said boards shall be known respectively as 'the board of regents for the northeast Missouri state teachers college,' the 'board of regents for the central Missouri state teachers college', the 'board of regents for the southeast Missouri state teachers college,' the 'board of regents for the southwest Missouri state teachers college,' and the 'board of regents for the northwest Missouri state teachers college' and the 'board of regents for Lincoln university:' and by their respective names they shall have perpetual succession, with power to sue and be sued, complain and defend in all courts, to take, purchase and hold real estate, and sell and convey or otherwise dispose of the same, and to make and use a common seal and to alter the same. (R. S. 1929, Sec. 9596.)"

In State ex rel. Thompson v. Board of Regents, 305 Mo. 57, l. c. 68, the Supreme Court stated in speaking of the above section: "Under Sec. 11491 the board of regents is empowered to sue and be sued, to take, purchase and hold real estate and to sell and otherwise dispose of same. This section invests the board with powers akin to those of a corporation and within the limits defined recognizes the board as a legal entity without in any wise lessening the State's sovereignty."

Section 10760, R. S. Mo., 1939, provides:

"Each state teachers college shall be under the general control and management

of its board of regents, and the board shall possess full power and authority to adopt all needful rules and regulations for the guidance and supervision of the conduct of all students while enrolled as such; to enforce obedience to the rules; to invest the faculty with the power to suspend or expel any student for disobedience to the rules, or for any contumacy, insubordination, dishonesty, drunkenness or immoral conduct; to appoint and dismiss all officers and teachers; to direct the course of instruction; to designate the textbooks to be used; to direct what reports shall be made; to appoint a treasurer for such college and to determine the amount of his bond, which shall be in amount not less than ten thousand dollars; and to have the entire management of the college including qualifications for admission. (R. S. 1929, Sec. 9603)."

In State ex rel. Thompson v. Board of Regents quoted supra the court, at page 65 stated: "While in a sense, the board is an agent of the state with defined powers, the importance of its duties with their attendant responsibilities, is such as to necessarily clothe the board with a reasonable discretion in the exercise of same. This is inevitably true, first because of the difficulty in framing a statute with such a regard for particulars as to cover every exigency that may arise in the future, and second, because a restriction of the board's powers to the letter of the law would destroy its efficiency and to that extent cripple the purpose for which the institution was created. Legislatures therefore, moved by that wisdom which is born of experience whether conscious or not of that aphorism "new occasions teach new duties; time makes ancient acts uncouth" have contented themselves with defining in general terms the powers of such boards as are here under review, leaving the discharge of duties not defined and which may under changed conditions arise in the future, to the discretion of the board."

CONCLUSION.

It is therefore the opinion of this office that

Mr. Roy Ellis

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Aug. 15, 1944

the Board of Regents of the State Teachers College of Missouri, at Springfield, may in its discretion, lease facilities of the college for joint use with the O'Reilly General Hospital, an Army convalescent hospital.

Respectfully submitted

ROBERT J. FLANAGAN
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

RJF:LeC

ELECTIONS: In St. Louis City no registration number is required to be placed on ballots; all numbers on ballot must be covered by sticker.

October 6, 1944.

FILE

26

10/10

Board of Election Commissioners,
208 S. Twelfth Blvd.,
St. Louis, Missouri.

Gentlemen:

On September 7, 1944, you requested an opinion from the City Counselor of St. Louis on three questions involving the administration of the election law in the City of St. Louis. He rendered his opinion on September 18, 1944, and made there-with the suggestion that since State and National officers are involved at the coming general election the questions should also be presented to the Attorney-General for his opinion. On September 19, 1944, through the board's chief clerk the request was made for the Attorney-General's opinion.

The opinion of the City Counselor is as follows:

Gentlemen:

We have your letter of September 7th, requesting our opinion on certain questions which are, substantially, as follows:

(1) Does the law regulating registration in the City of St. Louis provide for a "registration number" such as is referred to in Section 11608, R. S. Mo. 1939, as amended by Laws 1943, page 544, and Section 11595, R. S. Mo. 1939?

(2) If such law does not provide for such "registration number", is it proper to use, in lieu thereof, the number of the voter as shown by the poll books?

(3) Is it necessary, under the provisions of Section 11607, R. S. Mo. 1939, as amended by Laws 1941, page 363, to place a sticker over the serial number on the face of the ballot, as well as over the number of the voter placed on the back of the ballot?

I.

Section 11595, R. S. Mo. 1939, which is a general provision relating to elections, provides, in part, as follows:

"Provided, that in all cities and counties which now have or may hereafter have a legal registration, the election commissioner shall cause the ballots to be printed on the same leaf with a stub not over two inches in width, and separated therefrom by a perforated line extending across the top of the ballot one inch from the top thereof. Upon the left-hand margin of the stub of this ballot shall be printed the serial number of the ballot; one-half inch to the right of this serial number shall be left a space enclosed within printed lines not less than one-fourth inch in width nor less than one inch in length in which a judge of election will write the registration number of the voter when the ballot is voted. The same number as appears on the stub shall be printed on the left-hand side of the ballot near the top, and not more than one inch below the perforated line separating the ballot from its stub. The number of each ballot shall be the same as that on the corresponding stub and the ballots and stubs shall be numbered consecutively in each city: Provided, that the sequence of numbers of such ballots and stubs shall begin with the number 1.* * * * In such precincts the election judges, at the time of separating the ballot from its stub, shall write in the space printed on this stub the registration number of the voter to whom the ballot shall be delivered. On receiving the ballot from the voter the number of the ballot voted in the order in which it is received, but no other writing except the initials of two judges as provided for in section 11602 of this chapter, shall be on the back of the ballot. All stubs shall be carefully preserved and returned with unused ballots to the office of the election commissioners. No ballots shall be torn from its stub except for delivery to a voter.* * * *"

Section 11608, R. S. Mo. 1939, as amended by Laws 1941, page 543, is, in part, as follows:

"The judge to whom any ticket shall be delivered shall, upon receipt thereof, pronounce in an audible voice the name of the voter; and if the judges shall be satisfied that the person offering to vote is a legal voter, his ticket shall be numbered and

placed in the ballot box without inspecting the names written or printed thereon, or permitting any other person or persons to do so; and the clerks of election shall enter the names of voters and the numbers of the ballots, in the order in which they were received, in the poll books, in conformity with the form printed in section 11490, and, in addition, whenever a registration is required by law, place on such ballot the number corresponding with the number opposite the name of the person voting, found on the registration list; and no ballot not so numbered shall be counted; * * * *."

Up to the year 1895, the registration laws applicable to the City of St. Louis provided for a registration number for each voter registered.

Section 989, R. S. Mo. 1939, (Laws of 1883, page 39, amended), applicable to cities of the first class, provided that,

"The registration books and the registration lists or poll-books, as hereinafter provided to be delivered to the judges of election, shall be in the following form: * * *".

The form then follows and its first column bears the designation, "Registration NO."

In 1895 (Laws 1895, Special Session, p. 15), the Legislature enacted a new law, applicable to St. Louis, providing for a Board of Election Commissioners, and, in detail, a system of registration. This law made no provision for a registration number. It was so held by the Supreme Court, in banc, in *Timmonds v. Kennish*, 244 Mo. 318, 1.c. 324.

Thereafter, the laws regulating registration in St. Louis were changed from time to time until the Permanent Registration Act was passed in 1937 (Laws 1937, p. 235; R. S. Mo. 1939, Chapter 76, Article 24.)

An examination of all of these laws since 1895 reveals that, in none of them is a "registration number" required. This being so, we think the question is ruled by *Timmonds v. Kennich*, supra. That suit was a contest brought by plaintiff to challenge the election of defendant as Judge of the Supreme Court. Defendant had been declared elected on the official returns. The Court says (1.c. 320):

"It is conceded by defendant that none of the votes cast in the city of St. Louis in the election of 1910 had the registration number of the voter indorsed thereon. It is further conceded that without the vote of St. Louis plaintiff would have been elected, as he had a majority of the vote cast in the State outside said city. The case, then, depends upon whether the absence of the registration number of the voter in the city of St. Louis on his ballot invalidated his vote. If it does, then the entire vote in St. Louis must be thrown out, and the office given to plaintiff. * * *

And, further, (l.c. 327 and 328):

"* * *The law does not require an impossible thing to be done. It is obviously impossible to indorse upon a ballot a number that does not exist, and hence the manifest nonapplication of section 5905 to this situation, and its no less manifest inconsistency with the special law governing elections in the city of St. Louis.

"* * *

"Since the passage of the act of 1895 the election officials of the city of St. Louis have construed the law to require no registration book, and, consequently, no such number on the ballot. This construction has been acquiesced in by the entire community, including candidates defeated for office, up to the time of the institution of this contest. In 1903, after eight years of such construction, the Legislature substantially re-enacted the law in this regard, without providing for any registration number. These facts are of great persuasive force. We ought not to render a judgment reversing this settled construction - a judgment which would disfranchise the entire voting population of St. Louis - unless constrained to do so by a mandate of the statute which is of clear, certain and undoubted construction to that effect. We find none such. On the contrary, we can reconcile the somewhat disjointed election statutes, only by holding that the law applicable to St. Louis (section 6220) is in harmony with section 5899 of the general law which forbids any indorsement on the back

of the ballot save the initials of the judges and the voting number, and is inconsistent with section 5905, which provides for a registration number."

Under the present registration law, as under the registration law under consideration in the Timmonds case, no provision for a "registration number" is made, and, as said in that case, "The law does not require an impossible thing to be done."

Under the authority of the Timmonds case, therefore, we are of the opinion that, in St. Louis, no "registration number" is required to be put upon the ballot stub and that the provision of the statute requiring the placing of a "registration number" on the ballot stub is inapplicable to St. Louis.

II.

You next inquire whether it is proper to use, in lieu of a "registration number", the number of the voter as shown by the poll books. In our opinion, such use is not proper or permissible.

The law is vitally concerned with preserving the secrecy of the ballot, and, to this end, specifies with particularity the markings that may be placed upon the ballot and stub. It provides that the number of the voter, as shown by the poll book, shall be placed on the back of the ballot, along with the initials of the judges. No provision is made for the marking of that number at any other place, either on the ballot or the ballot stub, and, in the absence of such provision, your Board is without authority to place such number in the space on the stub provided for the "registration number."

III.

You next inquire whether it is necessary, under the provisions of Section 11607, R. S. Mo. 1939, as amended by Laws of 1941, p. 363, to place a sticker over the serial number on the face of the ballot, as well as over the number of the voter placed on the back of the ballot.

Section 11607, R. S. Mo. 1939, is as follows:

"Every ballot shall be numbered in numerical order in which received, and it shall be the duty of the election judges, in the presence

of the voter, before any ballot is placed in the ballot box, to cover or conceal securely the identifying number or numbers placed on the ballot by placing over the number or numbers, and pasting down, a black sticker, which sticker is to be two inches square with gummed edges extending three-eighths ($3/8$) of an inch towards the center of the square, so as to conceal but not destroy, the number or numbers placed thereon. Such stickers shall be supplied to the election judges by the County Clerk or Board of Election Commissioners of each county or city, and no sticker shall be removed except in case of contested elections, grand jury investigations, or in the trial of all civil or criminal cases in which the violations of any law relating to elections, including primary elections, is under investigation or at issue and then only on the order of a proper court or judge thereof in vacation. No judge of election shall deposit any ballot upon which the names or initials of the judges, as hereinbefore provided for, do not appear."

In 1941, the Legislature amended this Section to read, in part, as follows (Laws 1941, p. 363):

"Section 11607. Ballots to be numbered and numbers covered--sticker to be removed, when.--- Every ballot shall be numbered in numerical order in which received, and it shall be the duty of the election judges, in the presence of the voter, before any ballot is placed in the ballot box, to cover or conceal securely the identifying number or numbers placed on the ballot by placing over the number or numbers, and pasting down, a black sticker, which sticker is to be two inches square with gummed edges extending three-eighths ($3/8$) of an inch towards the center of the square, so as to conceal but not destroy, the number or numbers placed thereon.* * * No judge of election shall deposit any ballot upon which the names or initials of the judges, as hereinbefore provided for, do not appear,"

It will be noted that the stickers are required to be placed over "the number or numbers", so as to conceal "the identifying number or numbers placed on the ballot."

It is a rule of the construction of statutes that effect must be given, so far as possible, to each word, phrase and sentence, and it must be held that the Legislature contemplated that,

in certain instances there would be only one number to be covered, while, in others, there would be more than one number to be covered.

Section 11595, R. S. Mo. 1939, provides that no writing, other than the judges' initials and the number of the voter as appears on the poll book, shall be on the back of the ballot. This is the same section that requires that the "registration number" shall be placed on the stub.

Section 11608, R. S. Mo. 1939, (Amended Laws 1943, p. 543) provides, in part, that,

"* * * the clerks of election shall enter the names of voters and the number of the ballots, in the order in which they were received, in the poll books, in conformity with the form printed in Section 11490, and, in addition, whenever a registration is required by law, place on such ballot the number opposite the name of the person voting, found on the registration list; and no ballot not so numbered shall be counted;* * *"

Whether this requires the "registration number" on the back of the ballot, notwithstanding the provisions of Section 11595 (supra), we need not determine, since we have already concluded that, in St. Louis, no "registration number" is provided for or required.

It may be the framers of Laws 1941, p. 363, construed the law as requiring, in some election districts, a "registration number", as well as a poll number on the back of the ballot and, for that reason, used the phrase "number or numbers placed on the ballot."

Be that as it may, we have seen that, in St. Louis, there can be only one number on the back of the ballot, that is, the poll number. However, another number does appear on the ballot - the serial number, on the face thereof. Shall the Board require that a sticker be placed over this number?

The statute has as its sole purpose the preservation of the secrecy of the ballot, and should, in our opinion, be so construed as to best achieve that purpose. Section 11595 provides that the ballots and stubs shall be numbered consecutively and that the sequence of numbers of such ballots and stubs shall begin with the number 1. It is obvious that one present at the polls when the ballot is handed out is in a position to identify, when the ballots are opened, the ballot of a particular voter by the serial number, unless such number is concealed. The ballots have consecutive serial

numbers, and are required to be given out serially. Likewise, the voters are numbered consecutively in the poll book. It is, therefore, possible for a person in the polling place having access to the poll books, to determine the serial number of a particular voter by matching his poll number with the serial number, having due regard to the number of spoiled and returned ballots, and, in this manner, be able to identify the ballot when opened for counting.

It is, therefore, our opinion that a construction of the statute consistent with its end and purpose requires the serial number to be concealed. Obviously, this cannot be done after the ballot has been prepared and returned to the judges, as this would entail opening the ballot and revealing its markings. It can only be done after it has been torn from its stub and before it is received by the voter. With both the poll-number on the back and the serial number on the face covered and concealed, there would seem to be no possible means of identification and the purpose of the statute would be fully and completely accomplished.

To recapitulate, then, our opinion is as follows:

(1) No "registration number" is provided for or required in St. Louis and the space on the stub provided for its insertion should be left blank.

(2) It is not proper or permissible to insert the poll-number in the space on the ballot stub provided for the "registration number."

(3) The Board should require that, before the ballot is received by the voter, a sticker be placed over the serial number on the face of the ballot; and then, when the ballot is returned by the voter, to the judge, that the poll-number is put on the back of the ballot and another sticker put over this number.

Inasmuch as the election of national and state officers is involved in the November election, we believe your Board should present this matter to the Attorney-General of the State, and enclose an extra copy of this opinion for transmittal to him in connection with your request for his opinion.

Very truly yours.

We have examined this opinion, reviewing the authorities cited therein and have made independent research on these subjects, and are of the view that the conclusions reached therein are correct and are amply supported by the statutes as construed by the courts.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

VANE C. THURLO
Acting Attorney-General.

LLB/LD

RECORDER.

(- Grantees should be named in index
) in the manner their names appear
(in deed.

May 4, 1944

5/4/44



Honorable Ross C. Ewing
Recorder of Deeds
Audrain County
Mexico, Missouri

Dear Mr. Ewing:

This will acknowledge the receipt of your inquiry of May 2, 1944, which is as follows:

"I would like your opinion of Section 13,164 Revised Statutes of Missouri, 1939, in regards to Deeds made to Husband and Wife, should the Grantees be listed as John Doe and Wife or John Doe and Mary his wife, this office has always listed like the first example and I would like to know if this is correct. "

Sec. 13164, R. S. Mo., 1939 is as follows:

"The recorder of each county in this state shall keep in his office a well-bound book or books, to be known as the 'abstract and index of deeds,' which shall have appropriate columns properly ruled and headed for each of the following items, namely: Names of grantors and grantees, date of instrument, date of filing instrument, for record, nature of instrument, book and page where recorded, description of land conveyed or affected; said books shall be divided into two equal parts, the front part to be alphabetically arranged for the names of grantors, and the back part to be alphabetically arranged for the names of grantees."

In the case of State v. Corneli, 149 S. W. (2d), 815, 821, the court, in a case relating to a tax assessment, held:

"* * *We find nothing in the statutes requiring that assessments of personal property, or orders with reference thereto, shall be in the full, true, correct, and lawful name of the owner. Sec. 9791, R. S. 1929, Mo. St. Ann. Sec. 9791, p. 7897, provides that no assessment of property for taxes shall be considered illegal on account of any informality. See State ex rel. Wyatt v. Cantley, 325 Mo. 67, 26 S. W. 2d. 976, 979. Authorities in point however, are very limited. Most cases from other jurisdictions involve real estate or were decided under special statutes. The matter is discussed in 61 C. J. 707, Sec. 871, where it is said: 'Also, it seems that a designation is generally sufficient, if the name entered is one which the person commonly uses and the one by which he is generally known.'* * *

"In the case of Carrall v. State, 53 Neb. 431, 73 N. W. 939, 940, a statute required the 'names of witnesses' to be endorsed on the information. The name 'Mrs. Fred Steinburg' was endorsed. The state sought to use Alena Mary Steenburg, wife of Paul Fred Steenburg, as a witness. Defendant contended the name of the witness was not endorsed. There was evidence that she gave her name as 'Mrs. Fred Steenburg' and that her husband was known as 'Fred Steenburg.' The court disposed of the issue of identity as a question of fact, and said: 'It must be said that, in a strict sense or meaning, this was not the name of the witness. A married woman takes her husband's surname, and by a social custom, which so largely prevails that it may be called a general one, she is designated by the use of the Christian name, or names, if he has more than one, of the husband, or the initial letter or letters of such Christian name or names of the husband, together with the appellative abbreviation "Mrs." prefixed to the surname; and all married women (there may be, possibly, a few exceptions) are better known by such name than their own Christian name or names, used with their husband's surname, and their identification would be more perfect and complete by the use of the former method than the latter.'"

Under the above statute it becomes the duty of the recorder to properly index a deed and unless he does

that he becomes personally liable for neglect or refusal to do his duty. In regard to such question the Court in the case of *Emerson-Brantingham Implement Co. v. Rogers*, 216 S. W. 994, 995, held:

"* * * The other line of cases has its origin in *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533, where the court refused to extend this doctrine to the failure of the recorder to properly index recorded conveyances, a duty imposed on him by section 10384, and held that a deed properly filed and copied in the records imparts notice of its contents notwithstanding the failure of the recorder to index it. The court there said:

'The grantee has no control over the official acts of the recorder, and when he has delivered to the officer his deed, he has performed all the duty within his power; and when the deed is copied on the record, the statute says it shall be considered as recorded from the time it was delivered. The subsequent sections are distinct and independent provisions respecting indexing, and do not form a part of the law as to recording. They impose a duty on the officer, and denounce a liability for a neglect or refusal to obey that duty, but they do not make what has previously been done void.'

"It is pointed out that the statute that makes a record of a conveyance impart notice requires that the instrument be copied on the record and that the indexing of such record is imposed by another section of the section and is not essential to the validity of such notice. * * *"

Hon. Ross C. Ewing

-4-

May 4, 1944

CONCLUSION.

Therefore, it is clearly the duty of the recorder to index a deed in the names of the grantees as such names appear in the instrument.

Respectfully submitted

S. V. MEDLING
Assistant Attorney General

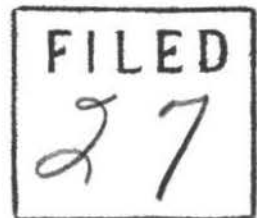
APPROVED:

ROY McKITTRICK
Attorney General

SVM:LeC

INSURANCE: Approval of Amendment to Articles of Incorporation
of Physicians Life and Casualty Company, of Springfield,
Missouri.

7-31
July 17, 1944



Mr. Preston Estep, Counsel
Insurance Department
Jefferson City, Missouri

Re: Amendment of Articles
of Incorporation of
Physicians Life and
Casualty Company,
Springfield, Mo.

Dear Sir:

We have your letter of July 15th, 1944, enclosing for our attention the papers in connection with the Amendment of the Articles of Incorporation of the Physicians Life and Casualty Company, in which the company desires to change the registered office of the corporation from 724 Woodruff Building, Springfield, Missouri to 915 Olive Street, Room 915 Syndicate Trust Building, St. Louis, Missouri.

We have examined the papers enclosed with your letter and find that the change of address of the registered office of the corporation has been duly and regularly changed from 724 Woodruff Building, Springfield, Missouri, to 915 Olive Street, Room 915 Syndicate Trust Building, St. Louis, Missouri, and that the amendment complies with the Laws of the State of Missouri and is consistent with the Constitution of the United States and the Constitution of Missouri.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

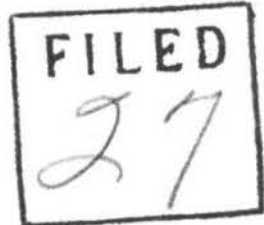
APPROVED:

ROY MCKITTRICK
Attorney General

CRM:CP

INSURANCE: Approval of Minutes of special meetings of directors and stockholders of the Commonwealth Life and Accident Insurance Company of St. Louis, Missouri.

August 23, 1944



Mr. Preston Estep, Counsel
Insurance Department
Jefferson City, Missouri

Dear Sir:

We have for attention your letter of August 22nd, in which you enclose a copy of the Minutes of Special Meeting of Stockholders of the Commonwealth Life and Accident Insurance Company, and also a copy of the Minutes of Special Meeting of the Directors of the Commonwealth Life and Accident Insurance Company, in which you request an opinion from this department as to whether the proceedings are in proper form, relative to the increase of the capital stock from \$50,000 to \$100,000.

We have examined the copy of the Minutes above referred to and find that they comply with the Laws of Missouri and are consistent with the Constitution of Missouri and the Constitution of the United States.

Respectfully submitted,

APPROVED:

COVELL R. HEWITT
Assistant Attorney General

ROY MCKITTRICK
Attorney General

CRH:CP

INSURANCE: Approval of Amendment of Articles of
Incorporation of Commonwealth Life and
Accident Insurance Company of St. Louis,
a corporation of Missouri.

December 19, 1944

1719

FILED

27

Insurance Department
State of Missouri
Jefferson City, Missouri

Attention: Mr. Preston Estep, Counsel ✓

In Re: Amendment of Articles of Incorporation
of Commonwealth Life and Accident
Insurance Company of St. Louis, Missouri.

Gentlemen:

This will acknowledge receipt of your letter
of December 19, 1944, enclosing copies of proceedings
of Directors and Stockholders meeting of the Common-
wealth Life and Accident Insurance Company of St. Louis,
Missouri; together with copy of Certificate of Amendment
to the Articles of Incorporation of said company, for
our approval.

It is the opinion of this department that the
enclosed proceedings are in proper legal form, and are
in accordance with the provisions of the statutes of
Missouri, and not inconsistent with the Constitution
and Laws of the State of Missouri and of the United
States.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

ARH:ml

INSURANCE: Approval of Declaration of Intention to Form
Corporation -- St. Louis Casualty and Surety Company

December 27, 1944

FILED

27

12/27

Insurance Department
State of Missouri
Jefferson City, Missouri

Attention: Mr. Preston Estep, Counsel

In re: St. Louis Casualty and Surety Company,
Declaration of Intention to Form Corporation

Gentlemen:

Your letter of December 26, 1944, together with enclosed copies of declaration of intention to form a corporation is acknowledged.

It is the opinion of this department that the enclosed declaration is in proper legal form and is in accordance with the provisions of the Statutes of Missouri and is consistent with the Constitution of Missouri and the Constitution of the United States.

Respectfully submitted

VANE C. THURLO
(Acting) Attorney General

VCT:DA

COUNTY CLERK: Not the duty of county clerk to make up Delinquent Personal Tax Books; County Clerk not required to make two complete sets of current personal and current real estate Tax Books.

January 10, 1944



Honorable F. Harold Fenix
Collector of Revenue
Jasper County
Carthage, Missouri

Dear Mr. Fenix:

Under date of December 30th, 1943, you wrote to this office requesting an opinion, as follows:

"I would appreciate having opinions from your office on the following two questions:

"1. Is it the duty of the County Clerk to make up Delinquent Personal Tax Books?

"2. Is the County Clerk required to make two complete sets of Current Personal and Current Real Estate Tax Books?"

Your questions will be treated in the order in which you have stated them. Both of your questions are matters for which we must consult the statutes in order to arrive at the answer.

Section 11110, R. S. Mo. 1939, provides for the making of "personal delinquent list," and "land delinquent list." This section is as follows:

"whenever any collector shall be unable to collect any taxes specified on the tax book, having diligently endeavored and used all lawful means to collect the same, he shall make lists thereof, one to be called the 'personal delinquent list,' in which shall be stated the names of all persons owing

taxes on personal property, where taxes cannot be collected, alphabetically arranged, with the amount due from each, and the other to be called the 'land delinquent list,' in which shall be stated the taxes on lands and town lots where taxes have not been collected, with a full description of said lands and lots, and the amount of taxes due thereon, set opposite each tract of land or town lot; and a like list of all delinquent clerks and other officers hereinbefore required to pay to the collectors the amount of revenue by them respectively received, to be called the 'delinquent list of officers.'"

Section 11114, R. S. Mo. 1939, requires the county court to correct the delinquent land list and certify it and file it in the office of the county clerk.

Section 11115, R. S. Mo. 1939, requires the county clerk to make a back tax book, which section is as follows:

"The clerk of the county court shall file the said list in his office, and within ten days thereafter make the same into a 'back tax book,' as contemplated by section 11120, under the seal of the court, and deliver the same to the collector of the revenue of his county, whose duty it shall be to proceed to collect the same, and to that end shall have the power, and it is hereby made his duty, to levy upon, seize and distrain personal property, and sell the same for such taxes, in the manner provided in this article. In the city of St. Louis the uncollected bills shall be returned with said list: Provided, that the city comptroller, or other proper officer, shall return said list within thirty days to the city collector. And if it appear that any county court or county clerk of this state has, within five years next before the taking effect of this section, failed in the discharge of any one of the duties prescribed by sections 11114 and 11120 of this article, or shall so fail

at any time hereafter, to such an extent that the collection of said taxes cannot be enforced by law, it shall be the duty of the said county court and clerk, or their successors in office, immediately after such omission or defect is discovered, to proceed at once to correct the same and supply the omission or defect, and return such corrected 'back tax book' to the collector, whose duty it shall be to collect the same, as hereinbefore set forth."

Section 11120, R. S. Mo. 1939, prescribes the manner of making the back tax book, and is as follows:

"Within thirty days after the settlement of the collector, in the odd numbered years, the several county clerks in each county in this state, and in such cities, the register, city clerk or other proper officer, shall make, in a book to be called the 'back tax book,' a correct list, in numerical order, of all tracts of land and town lots on which back taxes shall be due in such county or city, setting forth opposite each tract of land or town lot the name of the owner, if known, and if the owner thereof be not known, then to whom the same was last assessed, the description thereof, the year or years for which such tract of land or town lot is delinquent or forfeited, and the amount of the original tax due each fund on said real estate (and the interest due on the whole of said tax at the time of making said back tax book, together with the clerk's fees then due), in appropriate columns arranged therefor, and the aggregate amount of taxes, interest and clerk's fees charged against each tract of land or town lot for all the years for which the same is delinquent or forfeited; said back tax book, when completed, shall be delivered by said clerk or other proper officer to the proper collector of the county or such city, for which he shall take duplicate receipts, one of which he shall

file in his office and the other with the state auditor, and the clerk or other proper officer shall charge such collector with the aggregate amount of taxes, interest and clerk's fees contained in said 'back tax book.' In all such cities the said 'back tax book' shall be made out, in alphabetical order, in the name of the owner, if known; and if the owner be not known, then in the name of the person to whom such tract or lot was last assessed. All taxes, interest and clerk's fees hereafter contained in the 'back tax book' herein described shall bear interest from the time of the making out of said 'back tax book' at the rate of ten per cent per annum until paid. In computing interest under this article, a fraction of a month shall be counted as a whole month."

You will observe that in none of these statutes is there any requirement that the county clerk make a personal back tax book.

Inasmuch as these statutes, which are the only ones relating to the making of back tax books, do not require the county clerk to make such book there is no authority for the county clerk to make a personal back tax book.

In regard to your second question, the statute relating to the making of the back tax book is Section 11048, R. S. Mo. 1939, which is as follows:

"As soon as the Assessor's book shall be corrected and adjusted, the Clerk of the County Court, except in St. Louis City, shall, within ninety days thereafter, extend the taxes therein in proper columns prepared for such extensions, which book, with the taxes so extended therein, shall be authenticated by the seal of the Court as the Tax Book for the use of the Collector; and when the Assessor's book is in two or more volumes, such extension shall be made in all such volumes, and each vol-

ume shall be authenticated by the Clerk with the seal of the Court. And upon a failure to make out such extension of taxes in the Assessor's book or books, as the case may be, and deliver same to the Collector in the time specified, the County Court shall deduct twenty per centum from the amount of fees which may be due the Clerk for making such extension, and such Assessor's book, with the taxes so extended therein, shall be called the 'Tax Book.'

Nothing is said in this section about making two copies, or making any copies of the tax book. Prior to 1933 the county clerk was directed to make a copy of the tax book to be used by the collector, by Section 9876, R. S. Mo. 1929. Section 9876, R. S. Mo. 1929, was amended by the General Assembly in 1933.

Section 9876, R. S. Mo. 1929, was as follows:

"As soon as the assessor's book shall be corrected and adjusted, the clerk of the county court, except in St. Louis city, shall, within ninety days thereafter, make a fair copy thereof, with the taxes extended therein, authenticated by the seal of the court, for the use of the collector; and where the assessor's book is in two or more volumes, such copy thereof shall be divided into volumes in the same manner and designated by the same numbers, and each volume shall be authenticated by the clerk with the seal of the court. And upon a failure to make out and deliver to the collector such copy in the time specified, the county court shall deduct twenty per centum from the amount of fees which may be due the clerk for making such copy, and such copy of the assessor's book shall be called the 'tax book.'"

By comparing Section 11048, R. S. Mo. 1939, with Section 9876, R. S. Mo. 1929 you will readily see that the provision for making a copy of the tax book was removed from the section.

CONCLUSION

The answer to both of your questions is, no. There is no authority for the county clerk to make a delinquent personal tax book, or to make two complete sets of current personal and current real estate tax books.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:CP

ELECTION CONTESTS: Will not lie in elections to determine
municipal form of government.

August 22, 1944



Mr. Raymond L. Falzone
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Sir:

I am in receipt of your letter of August 9, 1944, wherein you state as follows:

"Moberly, Missouri, is a city of the 3rd class, and on July 18, 1944, at an election held at Moberly under Section 7080, et seq. the people voted in favor of adopting the City Manager Form of Government. The majority was substantial.

"I have been informed that on the day of the election the proponents of the plan placed at least one person inside of each polling place; that these persons made a record of those who voted and frequently during the day would pass this record to those outside of the polling place; that those outside of the polling place would then communicate with people who had not yet voted and request them to vote in favor of the plan. The people inside the polling place who made this record were supposed to be watchers or challengers and some of them resided in precincts and wards other than the precinct or ward in which they were stationed. Sometime during the day of the election the City Attorney requested the proponents of the plan to ask these watchers, or challengers, to get out of the polls and they did so.

"At the request of those who opposed the plan, I am writing you for an opinion as to whether or not said watchers, or challengers, or those responsible for their being in the polls, could be prosecuted. Also, could the election be set aside because of the said actions of the proponents of the plan. There is no evidence that the watchers, or challengers, talked to, or influenced any one voting inside the polling places.

"I can find no law which provides for the contest of an election of this kind, nor can I find any law under which the watchers, or challengers, could be prosecuted. I understand the law forbids electioneering within 100 feet of the polling place, but it occurs to me that these people were not electioneering.

"In as much as a Primary Election will be held shortly under this new plan, I would appreciate having your opinion on this matter just as soon as possible."

There are two sections in our statutes relating to electioneering. Section 4374, R. S. Mo. 1939 provides:

"It shall be unlawful for any judge of election, clerk or person designated as a challenger under any laws of this state, or any person or persons within the polling place, to electioneer for any candidate, party or proposition. Any violation of this section shall be a misdemeanor, and shall be punished by imprisonment not less than ten days nor more than ninety days, or by a fine of not less than fifty dollars nor more than one hundred dollars."

Section 11625, R. S. Mo. 1939 provides:

"No officer of election shall disclose to any person the name of any candidate for whom any elector has voted. No officer of election shall do any electioneering on election day. No person whatever shall do any electioneering on election day within any polling place, or within one hundred feet of any polling place. No person shall remove any ballot from any polling place before the closing of the polls. No person shall apply for or receive any ballot in any polling place other than that in which he is entitled to vote. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor."

One of the questions to be determined is whether the activity of the watchers or challengers in making a record of those who voted and in passing said information to persons out side of the polling place were guilty of electioneering within the meaning of the term as used in the above statutes.

You specifically call attention to the fact that there is no evidence that the watchers or challengers talked to or influenced anyone voting inside the polling places.

We have made a careful search of the authorities and fail to find where the terms "electioneer" or "electioneering" have ever been defined by the courts of this or any other state.

In the case of City of St. Louis v. Pope, 343, Mo. 479, 126 S. W. (2d) 1201, 1.c. 1210, 1211, the Supreme Court of Missouri said:

"In the Senter Commission Company case, City of St. Louis v. Senter Comm. Co., 337 Mo. 238, 85 S. W.2d 21, this court laid down this rule (page 24), 'The primary rule of construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent * * * this should be done from the words used, if possible, considering the language honestly and faithfully to ascertain its plain and rational meaning and to promote its object and manifest purpose'. * * *"

Although the terms "electioneer" and "electioneering" have not been defined by the courts, the meaning most commonly ascribed to these terms is the attempt or effort by an individual to influence the vote of another individual for a person, ticket, party, or issue. This practice by an officer of an election or a person within the polls is condemned by the statutes. Officers of elections within the polls on election day have but one duty, and that is to see that the election laws of this state are complied with and that no attempt is made to influence the voters in the exercise of their privilege.

The plain and rational meaning of the above terms can not be broadened to include the action of the watchers and challengers in the matter at issue. We do not wish, however, to be understood that we are condoning and approving this practice. It is rather to be condemned as encouraging distrust and suspicion in the election machinery.

The above statutes condemn electioneering in polling places and provide punishment both by fine or imprisonment. Penal statutes are construed strictly against the State. State vs. Green, 344 Mo. 985, 130 S. W. (2d) 475. In the case of St. v. Taylor, 345 Mo. 325, 133 S. W. (2d) 336, 1.c. 341 the Court said:

"The statute is penal and criminal and such statutes are generally 'construed strictly as to those portions which are against defendants, but liberally construed in those which are in their favor--that is, for their ease and exemption. No person is to be made subject to such statutes by implication, and, when doubts arise

concerning their interpretation, such doubts are to weight only in favor of the accused.' State v. Butler, supra, 178 Mo. loc. cit. 320, 77 S. W. loc. cit. 572. * * *

Since any doubt concerning the interpretation of a penal statute must be resolved in favor of the accused, we are of the opinion that the action of the watchers and challengers in making a record of those who voted and in passing such information to persons outside of the polling places although to be condemned does not come within the meaning of Sections 4374 and 11625, R. S. Mo. 1939, supra, condemning electioneering within the polls. Consequently the watchers and challengers, in our opinion, would not be subject to prosecution for their activity.

The next question to be determined is whether there is any statutory authority for the contest of an election of this kind.

Section 11632, R. S. Mo. 1939 deals with jurisdiction of election contests in part as follows:

"The several circuit courts shall have jurisdiction in cases of contested elections for county and municipal offices, and in all cities now having or hereafter attaining three hundred thousand inhabitants, the said circuit courts shall have jurisdiction in cases of contested elections for justices of the peace, and in cases of contested elections for seats as directors in the boards having charge of the public schools and public school property, and the county courts in contests of township offices: * * *

In the case of St. ex. rel. Hartly v. Gideon, 225, Mo. App. 459, l.c. 461, 40 S. W. (2d) 745, the Court discusses the history of the above statute pointing out that all election contests must be tried by some court. The court said:

* * * This provision of our statute has been on the books since 1895 but has never been construed or referred to in any case in Missouri as far as we are informed. The Constitution of the State, Article VIII, Sec. 8, is as follows: 'The trial and determination of contested election of all public officers, whether state, judicial, municipal or local, except governor and lieutenant-governor, shall be by a court of law or by one or more of the judges thereof. The general Assembly shall, by general law, designate the court or judge by whom the several classes of election contests shall be tried and regulate the manner of

trial and all matters incident thereto . . . ' The first act of the Legislature in which it sought to perform the duty imposed by that section of the Constitution gave the Circuit Court jurisdiction to try contests of elections for county officers and did not mention municipal officers. The Supreme Court held in State ex. rel. Francis v. Dillon, 87 Mo. 487, that the act did not give the Circuit Court jurisdiction to try an election contest for a municipal office because the word 'municipal' did not appear in the act. Later the Legislature amended the law by what is now section 10339, Revised Statutes 1929, provided that 'The several Circuit Courts shall have jurisdiction in cases of contested election for county, and municipal offices. . . ' Since the enactment of that law, the Supreme Court held in State ex rel. Brown v. Klein, 116 Mo. 259, 22 S. W. 693, that the change in the statute gave the Circuit Courts jurisdiction to try contested election cases for municipal offices."

In the case of State v. Speer, 223, S. W. 655, l.c. 659, the Supreme Court of Missouri in banc, declared the rule to be that there can be no election contest except where one is authorized by the statute. This case dealt with an attempt to contest a county's bond election. The Court said:

"* * * Elections to incur public debts have been conducted in this state from an early day, and yet the rule has always been declared that there can be no contest of any election except where one is authorized by statute, and so far no statute of the kind has been enacted in respect of municipal bond elections; whereas statutes are in force for the contest of other kinds. By reason of this non-action by the General Assembly and the common-law doctrine that the result of elections, if declared by supervising officials, could not be re-examined judicially, and the prevalent doctrine that equity takes no cognizance of such matters, we hold the circuit court of Pemiscot county is without jurisdiction of the cause there pending to annul the election in contest."

In the case of State v. Barton, 254, S. W. 85, l.c. 89 the Supreme Court of Missouri, in banc, again announced the rule that:

August 22, 1944

"* * * Election contests are purely statutory. As such, the letter of the law is the limit of their power. * * *"

The Court announced the same rule in the case of State ex rel. Jefferson County v. Waltner, 340 Mo. 137, 100 S. W. (2d) 272, l.c. 273 holding that the right to contest an election was neither a common law right nor an equitable right, but purely statutory. That case also dealt with the attempt to contest a county bond election. The Court said, l.c. 276:

"* * * The question before us concerns the jurisdiction of the circuit court, not the truth or falsity of the facts alleged. There being no common law, equitable or statutory authority for the bringing of a bond election contest, the circuit court has no jurisdiction of the proceeding, and can no more grant an injunction therein on facts not disputed than it could after a determination of disputed facts."

The above statute governing election contests clearly does not include elections to determine the form of government municipalities shall be governed by and absent statutory authority for contesting such types of election, we are of the opinion that no election contest can here be maintained.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

MW:mb

TAXATION: Surplus from tax sale should be paid to person entitled thereto. In case of redemption, interest should be charged on the purchase price, costs and subsequent taxes paid by purchaser.

November 30, 1944

Mr. Roth H. Faubion
Prosecuting Attorney
Barton County
Lamar, Missouri

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FILE

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Dear Sir:

We have your letter of recent date which reads as follows:

"The Treasurer and ex-officio Collector of Barton County, a County under (Township Organization), has in the past deposited the overplus from a delinquent Tax sale in an account in the Treasurer's office, known as the 'Overplus of Tax Sales'. This money is held for the use of either the original owner after a deed had been issued at the expiration of the two year redemption period for return to the purchaser if the property was redeemed during the two years redemption period.

"Is the above the correct procedure? And if so, when the property is redeemed should he charge interest on the full amount bid, that is, the overplus from the tax sale and the total cost, or should we only charge the individual in redeeming, interest on taxes and costs, and return to him from the Treasurer's office the amount of overplus without interest. It seems that Section 11145 Mo. Statutes Annotated, is vague on the subject as to whether the redeeming owner must pay interest on the full sum of the purchase money, as it states, or whether the interest is payable only on the original amount of taxes, costs of sale, etc."

We think your questions are answered by the statutes. Section 11132, R. S. Missouri 1939, reads in part as follows:

"Where such sale is made, the purchaser at such sale shall immediately pay the amount of his bid to the collector, who shall pay the surplus, if any, to the person entitled thereto; or if he has doubt, or a dispute arises as to the proper person, the same shall be paid into the county treasury to be held for the use and benefit of the person entitled thereto. * * * * *

The foregoing statute specifically requires the surplus, remaining after payment of the taxes and costs, to be paid to the person entitled thereto. Such person would be the owner of the property. Said statute further provides that in case of a doubt as to the proper person to receive the surplus, the amount shall then be paid into the county treasury until that question is settled.

This office has ruled that the surplus from a tax sale should be paid to the persons entitled thereto. Copies of these two opinions are enclosed herewith.

Section 11145, R. S. Missouri 1939, settles the question as to what the person redeeming the property must pay. Said section reads in part as follows:

"The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten per centum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such

taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption.
* * * * *

The amount thus required to be paid is "the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest, * * " and if the purchaser has paid subsequent taxes they shall also be repaid to him.

In cases which have been handled as you have indicated in your county it might appear unfair to charge the redeemer interest on the surplus of the purchase price since he has not had the benefit of that surplus. However, the purchaser has been out the use of his entire purchase regardless of the fact that it was not paid over to the person entitled to receive it. Therefore, in order to comply with the law we think that interest would have to be paid to the purchaser on the entire purchase price and on the costs and on subsequent taxes, if any.

CONCLUSION

It is, therefore, the opinion of this office that the surplus from tax sales should be paid to the person entitled thereto, and in cases where there is a question as to who such person is, in which event such surplus should be deposited in the county treasury to be held until the question is settled as to who is the person entitled thereto.

It is further the opinion of this office that the person redeeming property from a tax sale is required to tender the total amount of the purchase price and costs and subsequent taxes paid, if any, together with interest on said amounts.

Respectfully submitted

APPROVED:

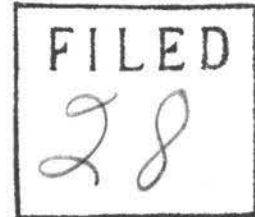
HARRY H. KAY
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

HHK:DA

PURCHASING AGENT: Section 56 of House Bill 408, Laws of Missouri, 1943, page 164, does not apply to the purchase of automobiles for state elective officials.

December 13, 1944



Honorable Ted Ferguson
State Purchasing Agent
Jefferson City, Missouri

Dear Mr. Ferguson:

This will acknowledge receipt of your letter of recent date requesting an opinion from this office, which reads as follows:

"Will you please advise this office at your earliest convenience your opinion as to whether or not Section 56 of House Bill 408 of the 1943 Legislature applies to the purchase of automobiles for the use of state elective officials."

Section 56 of the Appropriation Act, Laws of Missouri, 1943, page 164, provides:

"The State Auditor shall not audit and the State Treasurer shall not pay any warrant for the purchase of any passenger car for the use of any officer or employee of any department, board, bureau, commission or institution appropriated for by this Act--for a purchase price in excess of \$1,500.00. The said amount of \$1,500.00 shall include all trade-in allowances, or allowances or deductions of any kind, from the list price of said car fully equipped. The cost of all accessories

purchased for any such purchased car at the time of purchase or later, except necessary replacements or repairs, shall be charged against this limitation of \$1,500.00 or otherwise shall be disallowed by the said Auditor and Treasurer."

The question involved is whether or not a state elective official is an officer or employee of any department, board, bureau, commission or institution. We think it plain that they are not. All elective state officials are state officers by virtue of the Constitution. Many constitutional and statutory duties are imposed upon them as such. They are not, however, officers or employees of any department, within the meaning of Section 56, supra.

Conclusion

It is, therefore, our opinion that Section 56 of House Bill 408, Laws of Missouri, 1943, page 164, does not apply to the purchase of automobiles for the use of state elective officials.

Respectfully yours

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

BRC:HR

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SCHOOLS AND SCHOOL DISTRICTS: School property does not revert by reason of the temporary non-use of the school premises.

January 31, 1944



Honorable Andrew Field
Prosecuting Attorney
Caldwell County
Hamilton, Missouri

Dear Sir:

This is to acknowledge receipt of your letter, in which you request the opinion of this department. We are herewith setting forth in full your letter of request for the reason that it contains the statement of facts upon which we base our opinion, together with the questions to be answered. Your letter reads as follows:

"On August 5, 1912, one, George W. Houghton and wife, of Caldwell County, conveyed to School District No. 48 of said County, one half acre of land, described by metes and bounds, out of the Northwest corner of the Northeast Quarter of the Northeast Quarter of Section one (1), Township Fifty-five (55), Range Twenty-nine (29), which metes and bounds description will full appear by reference to a copy of the deed herewith enclosed, for school purposes. The recited consideration for said conveyance was \$1.00.

"Said deed contained a proviso, or reservation as follows: 'Provided, however, that in the event said property should ever cease to be used for school purposes, the title thereof shall revert to and vest in the then owners of said ~~N.E.~~ 4/N.E.4/ of said Section one.'

"A school house was erected upon said one half acre soon after said conveyance, and a public school was conducted and maintained in said building and premises from and after said date until about 1940, and the school district No. 48, was designated as the 'New Houghton' school.

"In the year 1940 the Board of Directors of said district ceased to use said building and grounds as a Public School, and all the pupils in that district were conveyed by bus to the Mirible Consolidated District located about two miles from said school house, and said pupils are still being conveyed to, and are attending, said Mirible Consolidated District.

"Several years after making the above mentioned conveyance, both the said George W. Hoghton and wife died, and the above mentioned forty acres adjoining said school grounds, has descended to, and is owned by one, Wayne Houghton, a son of the said George W. Houghton and wife. And, as the present owner of said adjoining forty acres, the said Wayne Houghton is claiming said described half acre tract, together with the temporarily unused school building thereon. He claims it under the proviso in said deed, and is trying to sell the school house to third parties, on the ground that it has ceased to be used for school purposes, and consequently belongs to him under said proviso. ✓

"The School Board of the said New Houghton District, No. 48, contends that their failure to use said buildings and grounds for school purposes, since 1940, and their transportation of the pupils of said district to said Mirible Consolidated District, does not constitute a cessation to use said buildings and grounds for school purposes, as contemplated in said proviso: That the highways over which the pupils of said district to said Consolidated District school, are fast becoming impassible during certain portions of the school year, and that said School Board may soon be compelled to again resume the use of said New Houghton School building and grounds, as it has been used prior to 1940. They are therefore protesting the claims of the said Wayne Houghton to the ownership of either the grounds or building in said deed described, and especially are contending that the said Wayne Houghton has no right to sell and remove said School building, even though said half acre of ground itself may have reverted to the said Wayne Houghton under said deed, which reverter they also deny.

"From the above facts, I submit to your office the following questions of law:

"1. Does the non-user of said grounds and school building for school purposes since 1940, constitute a cessation of the use of said property for school purposes so as to work a reverter thereof to the present owner of the adjoining premises, under said proviso in said deed?

"2. Assuming that there has been a reverter of the one half acre of ground that was conveyed in 1912, on which a school house was thereafter erected, does the reverter of the half acre carry with it the title and ownership of said school building, so that, the present owner of the reverted half acre has the right to sell and dispose of said school building?"

You have also enclosed with your letter a General Warranty Deed, dated August 5, 1912, by and between George W. Houghton and Mary A. Houghton, his wife, parties of the first part, and School District No. 48 of Township 55 Range 29 of Caldwell County in the State of Missouri, party of the second part, in consideration of the sum of One Dollar, conveying to the above school district lands described therein containing about one half acre of land, more or less, which said deed contains covenants of general warranty, duly acknowledged by the grantors therein, and in which deed there is this provision; "Provided, however, that in the event said property should ever cease to be used for School purposes, the title thereof shall revert to and vest in the then owners of said N.E.4/ N.E.4/ of said Section one."

We shall answer your questions in the order stated in your letter.

Under the provisions of Section 10403, RSMo. 1939, it is provided in part:

"The title of all schoolhouse sites and other school property shall be vested in the district in which the same be located; * * * * *

The question to be determined is whether or not there has been an abandonment of the land in question by the School district and by reason of said abandonment the title has reverted to the present owner of the quarter quarter section above described.

The general rules relating to reversion, or forfeiture of school property, are stated in 24 R.C.L. at paragraph 5, and is substantially the same words, in Am. Juris. Vol. 47, under the title of "school" Section 69, as follows:

"Where land is granted for school purposes, the question frequently arises as to whether the condition of the conveyance has been broken with a resulting revision

or forfeiture. The general rule is that a construction involving a forfeiture is not favored, on the theory that since the deed is the act of the grantor it will be construed most strongly against him. The recital in the deed of a substantial consideration negatives the idea of a trust, and will prevent a reverter, unless expressly provided for. In general, mere statements in the deed that property is conveyed for school purposes, or is to remain for such purposes, are not construed as conditions or limitations of the grant. In other cases, however, the language of the deed may constitute a condition upon the breach of which the land will revert or the title vest in the grantor or his successors, unless the right of the grantor to insist upon a forfeiture is waived, as where he fails to object to a failure to erect or maintain a schoolhouse. But a grant of land for use for school purposes, coupled with a condition subsequent, will not warrant a forfeiture by implication on account of an additional use. In some of the cases it is held that where the condition is once performed, it is satisfied and extinct, so that subsequent discontinuance of the use will not work a reversion or forfeiture."

The general rule as to nonuser is contained in 20 Corpus Juris, para. 595, p. 1235, as follows:

"In the absence of statutory provision, the general rule is that mere nonuser is not sufficient to constitute an abandonment, if for a period less than the statutory period of limitations, unless accompanied with a failure to pay the compensation, or there must be both a nonuser and an intention to abandon. * * *"

And further, a clear statement of abandonment is stated by the Missouri Supreme Court in *Hatton v. Railroad*, 253 Mo.660, l.c. 676, as follows:

"In the case of *Hickman v. Link*, supra, the rule was thus stated:

"Abandonment in law is defined to be 'the relinquishment or surrender of rights or property by one person to another..... Abandonment includes both the intention to abandon and the external act by which the intention is carried into effect.' 'To constitute an abandonment there must be the concurrence of the intention to abandon and the actual relinquishment of the property, so that it may be appropriated by the next comer.' (1 Am. and Eng. Ency. Law, p. 1 and note 5.)"

A forfeiture of land deeded for school purposes is not favored by the law, and since a forfeiture is in the nature of a penalty, it will be strictly construed against the person who seeks the forfeiture. Under the statement of facts set forth in your letter, and applying the rules of law enunciated above, we are of the opinion that there has been no abandonment of the land in question sufficient to work a forfeiture. From your letter we understand that at the present time, by reason of expediency, the School Board of District No. 48, designated as the "New Houghton" school, is merely sending the pupils of that district to another school, namely, the Miriabile Consolidated District. We take it from your letter that it is merely a temporary arrangement and at any time the New Houghton School District Board may use the New Houghton School building and half acre of ground for school purposes.

Replying then to your first question, our opinion is that there has been no reverter of the half acre of land in question, so that the owner of the quarter section does not become the owner of the half acre of land deeded for school purposes.

As to the title to the school building in question, which you state the owner of the forty acre tract claims and is trying to sell to third parties on the ground that it has ceased to be used for school purposes, and, consequently, belongs to him, under said proviso, since we have held that the real estate upon which the school building is situate has not reverted to Mr. Houghton, the owner of the forty acre tract, it is our opinion that he has no right, title or interest in the school building itself. Even though we had held that the half acre tract of land had reverted to him, under the authority of the case of Hatton v. Railroad, supra, the school district would have the right to remove the school building from the land.

CONCLUSION

It is, therefore, the opinion of this department that Mr. Wayne Houghton has no right or title to the half acre of land in question, and does not own or have any right to sell or dispose of the school building now located thereon.

Respectfully submitted,

APPROVED:

COVELL R. HEWITT
Assistant Attorney General

ROY MCKITTRICK

CRH/cp

SCHOOL FUND LOANS: (1) County court must require personal security for all school loans whether made prior to or after passage of 1943 laws.
(2) Borrowers must comply with provisions of Sec. 10386, Laws of Mo., 1943, p. 883, whether the loan was made prior to or after the passage of this section.

February 14, 1944



Honorable James A. Finch
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of February 9, 1944, which is as follows:

"The last Legislature repealed Sections 10378, 10384, 10385 and 10386, Article 2, Chapter 72, of the Revised Statutes of Missouri, 1939, and enacted six new sections in lieu thereof, one of them being Section 10386, which is found in the Session Acts of 1943, at page 883. I would like to have the opinion of your office on this question:

"Prior to the amendment, the county courts were authorized to loan money on real estate security and were not required to take a bond but might do so. Some loans were perhaps made without the bond. Under section 10386 the county court must require the borrower and the parties who have signed the bond as personal sureties to produce and furnish evidence to the county court annually on the interest-paying date of the loan, or within thirty days thereafter, evidence showing that each of said sureties remained solvent, and that they are resident householders of the county and own property of the value of an amount equal to the amount of the loan, in addition to

the debts for which the sureties are liable, and the section further provides that if the borrower and sureties fail to furnish satisfactory evidence the court shall proceed to enforce payment of principal and interest then due.

"Under this section, is the county court required to take bonds where bonds have not been taken and loans have been made without bonds, or does this section apply only to loans made after the effective date of the amendment?

"Would be pleased to have your opinion on this matter."

Your letter involves an interpretation of Sections 10376, 10384 and 10386, Laws of Missouri, 1943, pp. 880-883, repealing Sections 10376, 10384 and 10386, R. S. Missouri, 1939, and specifically inquires whether said sections apply to loans made out of school funds prior to the passage of these laws, inasmuch as the repealing sections by their terms make it mandatory:

(1) That personal security be given for all loans;

(2) That the parties who have signed as sureties furnish annually to the county court on the interest paying date of the loan or within thirty days thereafter, evidence showing that each of said sureties remain solvent, that they are resident householders of the county, and own property of the value of an amount equal to the amount due on the loan, in addition to all the debts for which said sureties are liable, and in addition to all property owned by said sureties that is exempted from execution, and further that if the borrower and sureties fail to furnish satisfactory evidence of the solvency of the sureties as herein provided, or if the borrower fails to furnish other solvent sureties, within ten days after an order to that effect shall have been made and served on the principal in the bond, the court shall proceed to enforce payment of both principal and interest due.

For these provisions to apply to prior acts and hence in a retrospective fashion, it must be found that they do not come within the inhibitions of Article II, Section 15, of the Missouri Constitution, which provides: "That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly." In interpreting the meaning of this section, it has been held:

A statute is not retrospective in its operation unless it impairs some vested right. *McManes v. Park*, 287 Mo. 109, 229 S. W. 211; *Gibson v. Chicago Great Western Ry. Co.*, 125 S. W. 453, 225 Mo. 473; *Clark v. Kansas City, St. L. & Cincinnati Ry. Co.*, 118 S. W. 40.

Acts of the legislature which relate only to the remedy of existing causes of action are not obnoxious to said section of the Constitution. *Gibson v. Ry.*, supra; *Clark v. Ry.*, supra; *State ex rel. v. Taylor*, 123 S. W. 892.

A statute which is merely remedial, affording a remedy for the redress of an infringement of an already existing right, or the enforcement of an already existing obligation, may be retrospective in its action without violating the constitutional provision. *Haarstick v. Gabriel*, 98 S. W. 760.

In Crawford's Construction of Statutes, page 566, Section 278, it is stated: "The rule that statutes should not be given a construction which will give them a retroactive effect is, as already indicated, especially applicable where such a construction will either destroy or impair vested rights." In Section 296, page 599, it is stated: "Repealing acts, as a general rule, operate retroactively, and in the absence of legislative intention to the contrary should not be denied that effect. But even a repealing statute must not interfere with vested rights or impair the obligation of contracts."

In 59 C. J. 1185, Section 722, it is stated: "The general rule against the retrospective construction of statutes does not apply to repealing acts, and in the absence of a saving clause or other clear expression of intention, the repeal of a statute has the effect, except as

to transactions past and closed, of blotting it out as completely as if it had never existed."

It remains to apply these principles to the questions propounded in your letter.

1. Should personal security be now required in all cases whether the loan was made before the passage of the repealing act or not?

Section 10 of Article XI of the Missouri Constitution provides:

"All county school funds shall be loaned only upon unencumbered real estate security of double the value of the loan, with personal security in addition thereto."

Section 10376, R. S. Missouri, 1939, provides that the county court " * * * may, in its discretion, require personal security in addition thereto, * * *." Section 10384 provides that the county court " * * * may, if they deem it necessary, also require personal security on such bond; * * *." Section 10386 provides:

"The county court shall have power, from time to time, to require additional security to be given on said bond when they, in their judgment, deem it necessary for the better preservation of the fund. If such additional security be not given within ten days after an order to that effect shall be made and served on the principal in the bond, and in all cases of default in the payment of interest, the court shall proceed to enforce payment of both principal and interest by writ, or in a summary manner, as provided in this chapter."

Sections 10376 and 10384, Laws of Missouri, 1943, pp. 880-881, provide:

Section 10376: "It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than three per cent per annum on unencumbered real estate security, worth at all times at least double the sum loaned, with personal security in addition thereto, * * * *."

Section 10384: "When any moneys belonging to said funds shall be loaned by the county courts, they shall cause the same to be secured by a mortgage in fee on real estate within the county, free from all liens and encumbrances, of the value of double the amount of the loan, with a bond, with personal security in addition thereto; * * *."

There seems to be a conflict with the Constitution in the former sections of the statutes since the Constitution by its terms seems to make personal security mandatory where school funds are loaned, whereas the 1939 statutes make it discretionary with the county court. However, in any event, it is clearly seen that personal security was contemplated before the passage of the repealing acts and could have been required at any time under Section 10386, R. S. Missouri, 1939, where it had not been obtained upon the original making of the loan. Borrowers, prior to the passage of the repealing acts, clearly, therefore, could not be said to have had a vested right or any right whatsoever that they would not have to give security for the loans they had obtained; nor would requiring them to give personal security impose any new or un contemplated obligation upon them. Therefore, there appears to be no reason why the laws of 1943, as far as their provisions making it mandatory that personal security be obtained on all loans is concerned, should not come under the general rule as to repealing acts heretofore mentioned, and be held to apply to loans made prior to the passage of these repealing acts.

2. Should the provisions of Section 10386, Laws of Missouri, 1943, p. 883, relative to annual reports, etc., of the personal sureties be held to apply to loans made prior to the passage of this section?

Section 10386, R. S. Missouri, 1939, provided:

"The county court shall have power, from time to time, to require additional security to be given on said bond when they, in their judgment, deem it necessary for the better preservation of the fund. If such additional security be not given within ten days after an order to that effect shall be made and served on the principal in the bond, and in all cases of default in the payment of interest, the court shall proceed to enforce payment of both principal and interest by writ, or in a summary manner, as provided in this chapter."

Therefore, the law prior to the repealing act contemplated that the court could investigate and if it found the personal security lacking or insufficient, could require additional security to be given within ten days, and foreclose upon failure. This new section merely provides that a report be made by the sureties so that the court may have evidence before it as to whether additional security is needed or not.

In *McManus v. Park*, 229 S. W. 211, it was held that the Laws of 1911, page 430, providing that the court appointing a trustee to succeed one disqualified, resigned, or dead shall have jurisdiction over the trust estate, and that every trustee shall make annual reports to the court appointing him, apply to all trustees appointed before or after the enactment of such law. The court held, l. c. 213:

"A law which does not impair any vested right is not retrospective in the constitutional sense, although it may change

the remedy or provide new remedies for
enforcing or defining such a right.

* * * *

"The act of 1911, under the authorities cited, requiring trustees appointed by the court in any trust estate to make an annual report only applies to procedure, is entirely remedial in operation, and affects nobody's existing right. Such trustee has no vested right in the manner of accounting for his trust. The statute may be construed to affect trust estates and trustees created before its passage without being contrary to the section of the Constitution."

In State v. Eaton, 292 S. W. 71, l. c. 74, it is stated:

"Appellants complained that the court only qualified 30 jurors, while they were entitled to 40 qualified jurors. By Laws of 1925, p. 194, sections 4017 and 4019, R. S. 1919, were repealed, and at page 196, Laws of 1925, new section 4017 was enacted in lieu of said two old sections. New section 4017 provides for 12 peremptory challenges by defendant and 6 by the state in capital cases, instead of 20 peremptory challenges by the defendant and 8 by the state, authorized by sections 4017 and 4019, R. S. 1919. * * * * *

"The contention that, if section 4017, Laws of 1925, p. 197, is applied to cases where the alleged crime was committed before the act took effect, the law violates provisions of our Constitution against ex post facto laws, is equally without merit. The number of challenges to which the defendant on trial is entitled is purely a procedural matter, and does not constitute a substantial right. In 12 Corpus Juris, 1103, it is said:

"Where a law relates to matters of procedure merely, and does not deprive the accused of any substantial protection, it is not ex post facto. Thus a law changing qualifications, method of selection, and method of impaneling jurors, a law changing the number of peremptory challenges allowed the accused or the prosecution, * * * is not ex post facto as to offenses committed before its passage."

Under the 1939 statute the court had the right to investigate the personal sureties in school loans. The new law merely provides a new remedy for enforcing or defining this right. It provides a new means for investigating sureties under these loans. Section 10386, Laws of Missouri, 1943, p. 883, as far as the requirements of an annual report of sureties are concerned, is merely remedial and would apply to loans made prior to the passage of the act.

CONCLUSION

1. It is, therefore, the opinion of this office that the county court must require personal security for all school loans, whether made prior to or after the passage of the 1943 laws.

2. It is further the opinion of this office that all borrowers must comply with the provisions of Section 10386, Laws of Missouri, 1943, p. 883, whether the loan was made prior to or after the passage of this section.

Respectfully submitted

ROBERT J. FLANAGAN
Assistant Attorney General

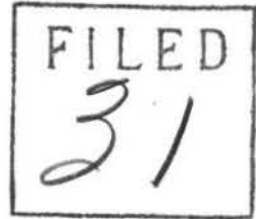
APPROVED:

ROY McKITTRICK
Attorney General

RJF:HR

Elections: Absentee votes to be counted by four disinterested persons appointed by the county clerk and either two justices of the peace or two members of the county court.

January 26, 1944



Honorable Robert H. Frost
Prosecuting Attorney
Clinton County
Plattsburg, Missouri

Dear Mr. Frost:

This will acknowledge receipt of your letter of December 21, 1943, in which you request an opinion of this department. This opinion request, omitting caption and signature, is as follows:

"Will you please give me your written opinion on the following question

"Who is charged with the duty of appointing the four disinterested persons to open, canvass, count and certify the votes cast by absent voters in counties such as Clinton."

In answer to your question we first wish to cite you to Section 11476, R. S. Mo. 1939, which provides as follows:

"In cases of elections wherein the county court or board of election commissioners, as the case may be, or not by law charged with the duty of canvassing the returns of such elections, the body or officials, charged by law with such duty for such elections, shall appoint the four disinterested persons to open, canvass, count and certify the votes cast by absent voters at such election, and the provisions of this article, in so far as applicable thereto, shall apply and govern in such elections."

It will be noted that in the above cited section of the statute two words are underscored, such words being "or not." From a reading of the statute it is readily apparent that such phraseology is a mistake or a misprint and if read exactly the way it is in the statute the meaning of such statute is not clear. We have traced this provision back to the Laws of 1933, at which time this section of the statute was first enacted, and find that in the official journals of the Senate that this provision read exactly the same as is quoted above. Therefore, in order for the meaning of this statute to be clear, we must endeavor to construe the meaning of the Legislature. We feel that the Legislature in enacting this provision meant that the word "or" should be "are" because it is apparent from reading this section that if the latter word is used the meaning of the statute is very clear. It would then provide that in cases of elections wherein the county court or the board of election commissioners; as the case may be, are not by law charged with the duty of canvassing the returns of such elections, the body or officials, charged by law with such duty for such elections, shall appoint four disinterested persons.

It is a familiar rule of law that "mere verbal inaccuracies or errors in statutes in the use of words, numbers, grammar, punctuation or spelling, will be corrected by the court whenever necessary to carry out the intention of the Legislature as gathered from the entire act. If the legislative intent is clear, it must be given effect regardless of inaccuracies of language." 59 C. J., page 991, Section 591. Such procedure was recognized and followed in the case of State ex rel. American Manufacturing Co., v. Koeln, 211 S. W. 31 (Mo. Sup.). Consequently, following such rule of law, we feel that after reading the entire section of the statute that the Legislature intended that the word "are" should have been placed in the statute instead of the word "or".

Therefore, it now becomes the question of whether the county court or the board of election commissioners are by law charged with the duty of canvassing the returns of the absentee ballots, or, if they are not, who should canvass such returns. Since this opinion pertains to counties such as the county of Clinton, we are naturally not concerned with any action on the part of a board of election commissioners, since

a board of this kind is non-existent in such counties. Consequently, the question arises as to whether the county court of Clinton County is charged with the duty of canvassing the returns of elections.

We further wish to call your attention to Section 11475, R. S. Mo. 1939, which is rather lengthy, and provides in part as follows:

"* * * Whenever the county court of any county, or the board of election commissioners, as the case may be, shall meet to canvass the votes according to law they shall first appoint four disinterested persons from the two dominant political parties, not more than two of whom shall be of the same political faith, for the purpose of opening and counting said absentee vote, * * *"

This section of the statute states that whenever the county court shall meet for the purpose of canvassing the ballots according to law they shall appoint the four disinterested persons about which you have requested an opinion. However, we have searched the statutes relative to elections and find at no place in the statutes of Missouri where the county court is required or authorized to meet for the purpose of canvassing the elections or casting up the ballots. Consequently, we feel that this provision as to the appointment of the four disinterested persons by the county court is of no effect, since there is no provision authorizing or requiring them to meet for that purpose. The statutes, however, do provide a way in which this shall be done, and do so in Section 11615, R. S. Mo. 1939. This statute provides the following:

"The clerk of each county court shall, within five days after the close of each election, take to his assistance two justices of the peace of his county, or two judges of the county court, and examine and cast up the votes given to each candidate, and give to those having the highest number of votes certificates of election."

Jan. 26, 1944

It is apparent from the above statute that it shall be the duty of the clerk of each county court to take to his assistance, which we feel means to designate, two justices of the peace of his county, or two judges of the county court, and to examine and cast up the votes given to each candidate, and after such is done to give a certificate of election to the candidates receiving the highest number of votes.

Returning to Section 11476, which we quoted above, we find that the county court is not charged by law with the duty of canvassing the returns of elections but that a certain body of officials is, to-wit, the county clerk and either two justices of the peace or two judges of the county court. In view of the fact that these men are charged with such duty, and not the county court, they then are empowered under Section 11476, supra, to appoint four disinterested persons to open, canvass, count and certify the votes cast by the absent voters at any election.

This department's former opinion on this question to Mr. Emory C. Medlin, dated May 17, 1938, is withdrawn.

Conclusion

Therefore, it is the opinion of this department that it is the duty of the county clerk and either two justices of the peace of the county, or two members of the county court, as is provided by Section 11615, supra, to appoint the four disinterested persons to open, canvass, count and certify the votes cast by absent voters in counties such as Clinton County.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG

PROBATE JUDGE: May obtain a reasonable allotment to care for necessary stenographic services provided he has complied with the provisions of the County Budget Law and the county has budgeted such allotment.

February 19, 1944

*Mime
copies*



Honorable Frank M. Frisby
Acting Prosecuting Attorney
Harrison County
Bethany, Missouri

Dear Sir:

We are in receipt of your letter of February 15, 1944, requesting an opinion from this department, which letter is as follows:

"Mr. R. E. Moulthrop, Prosecuting Attorney of this County, has now entered active service in the Naval Reserve, and I am handling the affairs of the office for him. The county court of this county is faced with the problem of approving the budget of the Probate Court regarding the salary of the clerk of the court. The Probate Judge set up in his budget the item covering stenographic service in connection with the keeping of the probate records and the county court has asked me to obtain an opinion from you with reference thereto.

"I assume that many of the Probate Judges of the State are in the same situation and you no doubt have been bombarded with requests for an opinion in this matter.

"The Honorable George H. Hubbell, sent me copy of his brief which he has made-upon the subject and in addition to that I would like to cite the cases of Harkreader -vs- Vernon County, 216 Mo. 696, and Motley -vs- Pike County, 233 Mo. 42. As authority in support of the obligation of the county court to pro-

vide necessary service under the statute in the Harkreader case, Judge Lamb goes into the question of personal service and decides that janitor service comes within the meaning of 'other necessities,' contemplated by the Statute and in the Motley case Judge Graves approves the opinion of Judge Lamb and goes farther and says 'that modern business as transacted by modern means and methods,' would surely cover stenographic service since records are now kept in the Probate Court in typewritten form.

"It is my personal opinion that in the light of the law as it now stands the court would extend the principles announced by Judge Lamb to also cover stenographic service necessary to properly keep the records of the probate court.

"I would very much appreciate an opinion from you upon this point."

The general rule of law, of course, is that an officer may not increase his compensation during his term, and that where certain official duties are prescribed by statute and definite salaries and fees provided for the officials, additional compensation may not be obtained for performing these official duties. *Maxwell v. Andrew County*, 146 S. W. (2d) 62; *Smith v. Pettis County*, 136 S. W. (2d) 282; *Nodaway County v. Kidder*, 129 S. W. (2d) 857.

Thus, under these rulings, since the law provides for a clerk of a probate court and provides for his duties, salary and compensation, additional compensation could not be secured to pay the clerk for the performance of these particular statutory duties. However, even in *Smith v. Pettis County*, supra, the court recognizes the right to other compensation where the work performed is not an official duty of the office. The act of typing and the act of stenographic work have a value in themselves and are not a part of the duties of a probate clerk as prescribed by statute, yet the typing of probate records has become by modern usage a neces-

sity to the carrying on of the business of the office. The typing of records is something separate and apart from the statutory duties of a probate clerk, and under modern needs is recognized as a necessity to the efficient carrying on of the work of a probate judge. For this reason, it is our belief that the question of whether the county court may make a reasonable allotment in its budget for stenographic services for probate judges is determined by the rules laid down in the following cases:

In Rinehart v. Howell County, 153 S. W. (2d) 381, Rinehart, Prosecuting Attorney of Howell County, sued the county for reimbursement of reasonable sums paid for necessary stenographic services incurred in the discharge of his official duties as prosecuting attorney of said county. The court said, 1. c. 382:

" * * * The case is to be distinguished from cases announcing the rule that officials may not receive compensation in addition to that authorized by law. Maxwell v. Andrew County, Mo. Sup., 146 S. W. 2d 621; Smith v. Pettis County, 345 Mo. 839, 844, 136 S. W. 2d 282, 285, * * *. Nodaway County v. Kidder, 344 Mo. 795, 129 S. W. 2d 857, likewise involved income and did not involve bona fide outlays. The instant case was submitted on the theory, as disclosed by the stipulated facts and undisputed testimony, that the outlays, as contradistinguished from income, were bona fide, reasonable and actual expenditures for indispensable expenses of the office by respondent (not on the theory that compensation to an officer was involved) and falls within the ruling in Ewing v. Vernon County, 216 Mo. 681, 695, 116 S. W. 518, 522(b). That case quoted with approval a passage from 23 Am. and Eng. Ency. Law, 2d Ed., 388, to the effect that prohibitions against increasing the compensation of officers do not apply to expenses for fuel, clerk hire, stationery, lights and other office accessories

and held a recorder entitled to reimbursement for outlays for necessary janitor service and stamps, stating: 'Fees are the income of an office. Outlays inherently differ. * * *'

The court thereupon cites various statutes authorizing and establishing salaries for stenographic services to prosecuting attorneys in the larger counties of the state, and goes on to say:

"Appellant's statutory citations constitute legislative recognition of the propriety of expenditures for stenographic services in the discharge of the present-day duties of prosecuting attorneys in the communities affected--an approved advance in proper instances for the administration of the laws by county officials and the business affairs of the county and for the general welfare of the public. Such enactments, in view of the constitutional grant to county courts, should be construed as relieving the county courts in the specified communities from determining the necessity therefor and, by way of a negative pregnant, as recognizing the right of county courts to provide stenographic services to prosecuting attorneys in other counties when and if indispensable to the transaction of the business of the county, * * *."

In closing, the court states:

"The result might differ under live issues involving the County Budget Law, lawful action by the General Assembly covering the subject matter in said county, nonarbitrary action by the County Court, or the substantialness of the testimony as to the absolute necessity for the services."

In *Ewing v. Vernon Co.*, 216 Mo. 681, a recorder of deeds sought to recover from his county for the reasonable value of janitor service that he had hired to keep his office in a clean and comfortable condition for the use of the plaintiff, his clerks, and the public in general. The court allowed his recovery and stated, l. c. 693:

"Finally, we shall assume that among civilized people approved advances and results in scientific research make janitor services in public offices (i.e., the prevention of the propagation and spread of disease from filth), a necessity, * * * * *"

"The statute relating to recorders ordains that he 'keep' his office, etc.; the word keep is one of wide and flexible meaning, one meaning being to maintain, to provide for. It involves the idea of continued effort in that line, i. e., that the office shall be carried on, enjoyed, etc. In this view of the case, the great breadth of the statutory word 'keep' permits of the notion that it was the legislative intent that the recorder of deeds should have the power to maintain and provide for his office in a reasonable way for the benefit of the public, * * *."

See, also, *Harkreader v. Vernon Co.*, 216 Mo. 696.

The obtaining of this allotment as mentioned in the *Rinehart* case, *supra*, would, of course, also depend on a compliance with the County Budget Law, Section 10910, et seq., R. S. Missouri, 1939.

Honorable Frank M. Frisby

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February 19, 1944

CONCLUSION

It is, therefore, the opinion of this office that a probate judge may obtain from his county a reasonable allotment to care for necessary stenographic services, provided he has complied with the provisions of the County Budget Law and the county has budgeted such allotment.

Respectfully submitted

ROBERT J. FLANAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RJF:HR

PROSECUTING ATTORNEY:

ASSISTANT PROSECUTING
ATTORNEY:

Appointment; liabilities.

January 12, 1944



Honorable A. L. Gates
Prosecuting Attorney
California, Missouri

Dear Mr. Gates:

Under date of January 11, 1944, you wrote this office requesting an opinion, as follows:

"As prosecuting attorney of Moniteau County I desire a written official opinion from your office concerning the following questions.

"1. As my induction into the United States Army appears imminent do I under the law have the authority while in United States service to retain my office during the present term? I understand that I do have that authority under a recent court decision and if I do have this right do I have the authority under Sec. 12962 R.S. 1939 to appoint an assistant prosecuting attorney in a county of this size? Our population is 11,775.

"2. Would an assistant prosecuting attorney appointed under the above conditions be liable for his official acts or would the prosecuting attorney be liable?

"3. An assistant prosecuting attorney appointed under the above conditions would he sign complaints and informations A. L. Gates, Prosecuting Attorney, by John Doe, Assistant Prosecuting Attorney or would he merely sign informations and complaints in his official capacity John Doe, Assistant Prosecuting Attorney?

"4. In appointing assistant prosecuting attorney under the above conditions is it necessary to have the approval of the circuit judge or the acting circuit judge of such an appointment?"

You are correct in your view of the law that your induction into the United States Army under the Selective Service Law will not vacate your office, and in this connection your attention is directed to the following brief quotation from the case of State ex inf. McKittrick v. Wilson, 166 S. W. (2d) 499, 1. c. 501:

"It is our judgment that Wall did not forfeit his office by being drafted into the military service of his country. This would be equally true if he had volunteered for the duration, particularly in view of our universal military service."

Section 12962, R. S. Mo. 1939, referred to in your letter, is as follows:

"Each prosecuting attorney in this state may appoint one assistant prosecuting attorney, who shall possess all the qualifications of a prosecuting attorney, and be subject to all the liabilities and penalties for failure or neglect to discharge his duty to which prosecuting attorneys are now or may hereafter be made liable."

To be read with this section are also Sections 12963 and 12964, R. S. Mo. 1939, prescribing the method of the appointment of an assistant prosecuting attorney, fixing his duties, and the manner in which he shall be paid. The last mentioned section is as follows:

"The assistant prosecuting attorney shall discharge the duties of the prosecuting attorney when the prosecuting attorney is sick or absent from the county, or when the prose-

cuting attorney is engaged in the discharge of the duties of his office, so that he cannot attend. The assistant prosecuting attorney shall be paid only by the prosecuting attorney, and may assist the prosecuting attorney at his request in any case: Provided, that he shall not be disqualified from defending in any case, civil or criminal, except those in which he shall have acted as assistant prosecuting attorney."

These three sections apply in all counties of the state except where there are other statutes relating to particular classes of counties. There is no other statute relating to counties the size of Moniteau County, and therefore these sections authorize the appointment of an assistant prosecuting attorney in Moniteau County.

Section 12962, supra, specifically makes the assistant prosecuting attorney liable for all penalties for failure or neglect to discharge his duties.

In connection with these three sections of the statutes, we wish to call to your attention the case of State v. Carey, 318 Mo. 813, 1. c. 817, in which the question was raised as to the legality of the filing of an information by an assistant prosecuting attorney, and in discussing the question the court spoke as follows:

"The legality of the act of the assistant prosecuting attorney in filing the information is challenged; and as a consequence the validity of the information. It is conceded by the appellant that the assistant was appointed under the authority of Sections 751, 752 and 753, Revised Statutes 1919.

"Section 751 confers the power of appointment of an assistant upon the prosecuting attorney, defines the qualifications of the appointee and declares his official liability to be those of the prosecuting attorney.

"Section 752 prescribes how the appointment

shall be made and the manner in which the appointee shall qualify for the discharge of his duties.

"Section 753, so far as the same relates to the matter at issue, provides that the assistant shall perform the duties of the prosecuting attorney, (1) when the latter is sick, (2) absent from the county, or (3) engaged in the discharge of the duties of his office and cannot attend.

"Under the facts we are only concerned with the third subdivision of the section. It is conceded by the appellant that at the time the information was filed the prosecuting attorney was 'at the court house engaged in the performance of his duties.' This being true, the presumption will obtain that the discharge of those duties was such that he could not attend to the filing of the information and that the assistant was, under the statute, within the purview of his authority in filing it. Other than the concession of the appellant there is no showing as to the character of the duties which were being performed by the prosecuting attorney at the time the assistant filed the information. No such showing could properly have been made because the time and manner in which a prosecuting attorney discharged his official duties are details which the law intended should be left to his exclusive regulation. 'Such matters,' as was held in *State v. Hynes*, 39 Mo. App. 569, 'cannot be investigated collaterally with a view to determining whether an assistant prosecuting attorney had authority to file an information. Delay and expense would be incurred in the investigation of such collateral matters and would open up an inquiry the sole effect of which would be to obstruct the administration of the law.' Under the facts in this case it would require the determination of the extent to which a prosecuting attorney should be engaged in other official duties to give jurisdiction to his assistant to act.

"In affirming the ruling in the Hynes case, supra, the Kansas City Court of Appeals in Browne's Appeal, 89 Mo. App. 159, said: 'The existence of the conditions under which the assistant prosecuting attorney may act must be left to the decision of the prosecuting officer and cannot be raised in a collateral action.' When, therefore, either condition defined in the statutes arises, an assistant prosecuting attorney may perform any act within the range of the duties of that office. This conclusion is in harmony with a well established rule in construing statutes defining the powers of public officers that 'where a public officer is authorized to appoint a deputy, the authority of that deputy, unless otherwise limited, is commensurate with that of the officer himself, and, in the absence of any showing to the contrary, it will be so presumed. Such a deputy is himself a public officer, known and recognized as such by law. Any act, therefore, which the officer himself might do, his general deputy may do also.' (Mechem's Offices and Officers, sec. 570.)

"Furthermore, in discussing the question here under review, in State v. Weeks, 88 Mo. App. 263, the Kansas City Court of Appeals hold that 'where an information is filed in a criminal court by an assistant prosecuting attorney (as was the case at bar), it will be presumed to have been filed by a proper official and that he had been duly appointed by the prosecuting attorney under the authority of Section 4975, Revised Statutes 1899 (now Sec. 751, R. S. 1919), in the absence of any record to the contrary.'"

As the Carey case announces that an assistant prosecuting attorney may perform any act within the range of the duties of that office, and the signing of informations would come under the duties of the prosecuting attorney, the assistant prosecuting attorney should sign his own name, in his own capacity, to informations and complaints.

Honorable A. L. Gates

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January 12, 1944

None of the sections above referred to require the appointment of an assistant prosecuting attorney to be approved by the circuit judge of the county where the appointment is made.

Respectfully submitted

W. O. JACKSON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOJ:HR

DEPARTMENT OF AGRICULTURE: Section 2, Paragraph D., Laws of
COMMUNITY SALES: Missouri, 1943, Page 311 construed.

March 29, 1944



Honorable J. W. George
State Veterinarian
Department of Agriculture, State of Missouri
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request of this department for an opinion, dated February 17, which request reads as follows:

"I have been confronted with the question of whether or not a person, firm or corporation buying livestock on his, or their, own account and move it to his, or their, feed lot or barn and later sells the livestock privately, is conducting 'community sale' as defined in Subsection D, of Section 2, of the Community Sales Law, found on Page 311, of Laws of Missouri, 1943.

"I will appreciate your opinion on this question."

Section 2 of the Community Sales Law, found on Page 311, Laws of Missouri, 1943, referred to by you in your opinion request, reads as follows:

"The following terms as used in this act shall, unless the context otherwise indicates, have the following respective meanings:

"(a) The term 'State Veterinarian' shall mean the State Veterinarian of the Missouri State Department of Agriculture.

"(b) The term 'person' includes individuals, partnerships, corporations and associations.

"(c) The term 'livestock' shall mean and include cattle, swine, sheep, goats, and poultry.

"(d) The term 'community sales' means any series of sales, exchanges, or purchases of any livestock made at regular or irregular intervals at an established place in this State, by any person, directly or indirectly, for or on account of the producer or producers, consignor or consignors thereof, at public auction or at private sale, except that this term shall not apply to established markets operating under Federal or State regulations, or to any public or private farm or purebred livestock sale."

In addition to the above, we also copy section No. 3, which reads as follows:

"No person as defined in this act shall engage in the business of operating a community sale unless duly licensed, as hereinafter provided."

Turning our attention to subsection D. of Section 2, supra., we shall first dwell upon the term "community sales". We think it advisable that we give the common definition and meaning of the word "community", as well as the word "sales". The word "community" is defined in 12 Corpus Juris at page 214 as follows:

"The term properly speaking refers rather to the people who reside in a given locality in more or less proximity, * * * * *"

The word "sale" is defined in Words and Phrases, Volume 38, Page 58 in substance as follows:

"a sale is a contract whereby one acquires a property in the thing sold, and another parts with it for a valuable consideration."

This definition was taken from the case of Popp Vs. Munger, 268 P. 1100, 131 Okl. 282.

We also think it advisable to define the word "series". In 57 Corpus Juris, Page 270, we find this definition:

"A continued succession of similar things bearing a similar relation to one another; an extended order, line, or course; sequence; succession!"

We appreciate, however, the fact that the Legislature has defined the term "community sales" in Paragraph D, and when we read the definition given in paragraph D, and consider it in the light of the common accepted definition of the word "community", as well as the word, "sales", and the word "series", if nothing else appeared in the law to further emphasize the intent of the Legislature, we would understand that the Legislature was intending that the community of the people who reside in the locality of the place where the sale, exchange or purchase are to take place at regular or irregular intervals, were to participate at such sales. However, it shall not be necessary that we confine ourselves to the procedure of ferreting out the particular meaning of each word contained in paragraph D., to arrive at the correct answer to your question propounded in your opinion request. We think that the true meaning and intent of the act is unambiguous and fully stated in the wording contained in other sections, namely 3 and 4, and when we read section 3, and a portion of the wording of section 4, in connection with paragraph D, it is our view that only one conclusion can be drawn as to the intent and meaning of the act, and this, we are under the rules of statutory construction, legally bound to do, for it was said in the case of Sharp Vs. Producers' Produce Company, 47 S. W. 2nd, 242, Missouri Appeal, 189, the Court said:

"In construing a statute the legislative intent must be kept in mind, if it may be ascertained, and the whole act, or such portions thereof as are in pari materia, should be construed, together. Keeney v. McVoy, 206 Mo. 42, 103 S. W. 946.* *"

Now turning to the act, we wish to particularly call attention to Section 3, which we have set out supra., and it will be noted that that section states that no person "shall engage in the business of operating a community sale", unless he is duly licensed. When we speak of the word "license" in the law, we think of that term in its ordinary meaning, or as stated in 37 Corpus Juris at Page 167, in part as follows:

"The term 'license' is not involved in uncertainty or doubt in its general and popular sense as used with reference to occupations and privileges, it means a right or permission granted by some competent authority to carry on a business or do an act which without such license would be illegal* * *"

"It has also been defined as the granting of a special privilege to one or more persons, not enjoyed by citizens generally, or, at least, not by a class to which the licensee belongs.

Therefore, as we have pointed out in Section 3, it is specifically stated that to obtain the license, one must engage in the business of operating a community sale and in Section 4 of the same act, we find that the first line states as follows:

"any person engaged in establishing or operating a community sale* * *"

In our view it is clear that the act when read as a whole truly contemplates that by the term "community sales" is meant a series of sales, exchanges, or purchases by one or more engaged in that business, as distinguished from other persons in the community who might seek to sell certain cattle, swine

March 29, 1944

sheep, goats, or poultry at some sale that he might have, wherein he would offer the livestock to the community at public auction, or private sale. In other words, it is our view that in order that a sale may be termed a community sale, within the meaning of the act, that a "person", as that term is defined in paragraph D of Section 2, must engage in establishing or operating a series of sales exchanges or purchases or livestock at regular or irregular intervals at an established place in the state, directly or indirectly, for or on account of a producer or producers, consignor or consignors at public auction or at private sales subject to the exception set forth in Paragraph D., as distinguished from a person, firm, or corporation buying livestock on his or their own account, and moving the livestock to his or their feed lot or barn, and later, selling the livestock privately and not through an established series of sales or exchanges, would not be said to be engaged in the business of operating a community sale.

CONCLUSION

It is the opinion of this department that a "person", as that term is defined in Paragraph b, Section 2, Laws of 1943, Page 310, to be amenable to the act must engage in establishing or operating the business of a series of sales, exchanges, or purchases of livestock at regular or irregular intervals at an established place in the state, directly or indirectly for or on account of the producer or producers, consignor or consignors thereof at public auction or private sale, subject to the exception set forth in Paragraph D, Section 2, Laws of Mo., 1943, Page 311.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

ROY McKITTERICK
Attorney General

BRC:ml

PROSECUTING : Payment of statutory fees by warrant or
ATTORNEYS voucher should be made to prosecuting
attorney and, in his absence, endorsed
by assistant.

June 12, 1944



Honorable J. B. Gallagher
Assistant Prosecuting Attorney
Moniteau County
California, Missouri

Dear Mr. Gallagher:

This is an acknowledgment of your letter of inquiry
to the General, which is as follows:

"I desire your opinion as Assistant Prosecuting Attorney on the following question. I file criminal cases in the Circuit Court in my name (as Assistant Pros. Att'y). I am not a deputy but by law have the same powers as the Pros. Att'y. However, the Circuit Clerk's Office insists that all checks for the fees due the Assistant Pros. Att'y. shall be made payable to the Pros. Att'y. who is in the Service. The Pros. Att'y. is now stationed in Michigan at a training camp. He may be sent over seas.

"I insist that the fees in all cases I have filed and will file should be made payable to me as Assistant Pros. Att'y. as I must collect and deposite them with the County Treasurer, file the receipts with the County Clerk and make the Quarterly Reports of the fees collected in my name to the County Court as is provided by law. I feel reasonably certain I am correct."

Section 12962, R. S. Mo. 1939, is as follows:

"Each prosecuting attorney in this state may appoint one assistant prosecuting attorney, who shall possess all the qualifications of a prosecuting attorney, and be subject to all the liabilities and penalties for failure or neglect to discharge his duty to which prosecuting Attorneys are now or may hereafter be made liable."

Section 12963 thereof is as follows:

"The appointment of said assistant prosecuting attorney shall be made in writing and signed by the prosecuting attorney, and they shall take and subscribe to the oath of office required of prosecuting attorneys, which appointment and oath of office shall be filed in the office of the clerk of the circuit court of the county."

Section 12964 thereof is as follows:

"The assistant prosecuting attorney shall discharge the duties of the prosecuting attorney when the prosecuting attorney is sick or absent from the county, or when the prosecuting attorney is engaged in the discharge of the duties of his office, so that he cannot attend. The assistant prosecuting attorney shall be paid only by the prosecuting attorney, and may assist the prosecuting attorney at his request in any case: Provided, that he shall not be disqualified from defending in any case, civil or criminal, except those in which he shall have acted as assistant prosecuting attorney."

Section 12939, R. S. Mo. 1939, provides for an annual salary, payable monthly, upon warrant of the county court, to your prosecuting attorney. The fees collected by him should be paid to the officer designated by statute to receive them. When the statute requires fees to be paid to the prosecuting attorney and by him paid to a designated official such procedure should be followed.

In the case of State ex inf. McKittrick v. Wilson the Supreme Court En Banc held that an office holder going away to war did not create a vacancy. A copy of such opinion is enclosed herein.

The duties of a Prosecuting attorney absent in military service should be discharged in his name by the statutory assistant acting in his behalf during such absence when so directed by legislative acts.

Hon. J. B. Gallagher

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June 12, 1944

CONCLUSION

Therefore, in view of the above statutes, it is the opinion of this department that when fees are required by statute to be paid to a prosecuting attorney and by him paid to a designated official, such warrants or voucher should be made to the prosecuting attorney and, in his absence in military service, his legally appointed assistant should endorse said warrants or vouchers in the name of the prosecuting attorney by himself as assistant.

Respectfully submitted,

SVM:EH

S. V. MEDLING
Assistant Attorney General

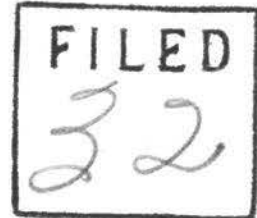
APPROVED

ROY MCKITTRICK
Attorney General

INSURANCE: Persons who are insurance brokers.

September 1, 1944

Mr. J. R. Garstang
Prosecuting Attorney
Osage County
Linn, Missouri



Dear Sir:

We are in receipt of your letter of recent date wherein you state as follows:

"Referring to your letter of the 26th inst. will say in reply thereto that the Bonding Company is the American Surety Company of New York; That I have been acting as the attorney for this company for the past 20 years or longer;

"Whenever a bond is required from this company, the company issues the bond and I collect the premium on the bond and send the premium less my collection fee, to the company. I do not solicit business, but when anyone wants a bond, I send to the American Surety Company for the bond, and collect the premium on the bond after the Bonding company has issued the bond and delivered it either to me or to my client.

"I do not issue the bonds, nor do I act as agent for the company, am not obligated to send to that company for my client's bonds, but naturally, having been associated with them for so long, I do throw most of my business to them.

"I have been acting under the provisions of Section 8297, R. S. 1939, which apparently applies exactly to my case.

"However, the company does pay me a 'commission' or fee for collecting the premiums, and that fee is on a percentage basis the same as I charge merchants or other clients for collecting their bills.

"I never at any time have the right or title to any of the bonds, neither do I pass on the qualifications of the persons applying for the bonds, although I sometimes do help my clients fill out applications for the bonds.

"There is no licensed 'broker' in Osage County, and when we need a bond, we have to send direct to some bonding company to get it.

"I do not want to be licensed as a broker, for I am a licensed attorney, and only do the applying for bonds for convenience to my clients, as most of the other attorneys of this county do.

"What I want to know, is whether, under that state of facts, and in view of the provisions of Section 8279 (above) a broker's license is required.

"P.S. The bonds we apply for are merely 'surety' or 'fidelity' bonds, and are not bonds for purchase or sale, as contemplated by the statute.

You raise the question of whether, under the facts submitted, a broker's license is required of you, particularly in view of Section 8297, R. S. Mo. 1939.

Section 8293, R. S. Mo. 1939 provides for the licensing of money brokers:

"No person, or association or company of persons, shall carry on the business of dealing in, or buying or selling, or shaving any kind of bills of exchange, checks, drafts, bank notes, promissory notes, bonds or other kind of writing obligatory, or in procuring the gold and silver of the country, to dispose of the same for a premium, in this state or elsewhere, without a license for that purpose continuing in force."

Section 8297, R. S. Mo. 1939 declares which persons shall be amenable to the above law.

"Persons who do not deal as money brokers or exchange dealers, except as incidental to their other business and as the exigency and convenience thereof may require, are not amenable to the provisions of this chapter."

The bonds contemplated by Section 8297, supra, are as you point out "bonds for purchase or sale" and do not apply to surety or fidelity bonds. In addition, the statute is directed to persons, associations, or companies who carry same on as a business. Since your dealings are merely incidental you would, in any event, be exempt from the purchase of a

brokers license under the provisions of Section 8297, R. S. Mo. 1939 supra.

Section 5906, R. S. Mo. 1939 authorizes the incorporation of insurance companies "for the purpose of transacting the business of becoming surety on bonds or obligations of persons or corporations, or of insuring the fidelity or persons holding places of public or private trust,". Section 6015, R. S. Mo. 1939 defines the persons that shall be deemed insurance brokers:

"Whoever, for compensation, acts or aids in any manner in negotiating contracts of insurance or reinsurance, for placing risks or effecting insurance or reinsurance for any person other than himself, and not being the appointed agent or officer of the company in which such insurance or reinsurance is effected shall be deemed an insurance broker, and no person shall act as such insurance broker, save as provided in this section. The superintendent of insurance may, upon the payment of a fee of ten dollars, issue to any person a certificate of authority to act as an insurance broker to negotiate contracts of insurance or reinsurance, or place risks, or effecting insurance or reinsurance with any qualified domestic insurance company or its agents, and with the authorized agents in this state of any foreign insurance company duly admitted to do business in this state. Such certificate shall remain in force one year, unless revoked by the superintendent of insurance for cause. Any person who shall act as broker or agent, in negotiating insurance or reinsurance, as above stated, without first having obtained a certificate of authority or broker's license for such purpose, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than ten nor more than one hundred dollars for each offense, to be recovered and applied in the manner prescribed in section 6020."

Under the facts as submitted you are, for compensation, aiding in placing risks effecting insurance for persons other than yourself, and are not the appointed agent or officer of the company in which such insurance is effected.

Since the language of Section 6015 supra, defining insurance brokers is plain and of but one meaning, there is no room for statutory construction (Cummins v. Kansas City Public

Mr. J. R. Garstang

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September 1, 1944

Service Company, 334 Mo. 672, 66 S. W. (2d) 920). We are therefore of the opinion that, under the facts submitted, you are an insurance broker and come within the provisions of Section 6015 R. S. Mo. 1939, which requires a certificate of authority from the insurance department.

Respectfully submitted,

APPROVED:

MAX WASSERMAN
Assistant Attorney General

ROY McKITTRICK
Attorney General

MW:mb

MOTOR VEHICLES: Decision of Commissioner as to type of motor vehicle, classification, computation of fees, final and conclusive on all licenses issued pursuant to Section 8369, Laws of Missouri, 1943, Page 663 to 666 inclusive.

March 3, 1944



Colonel M. Stanley Ginn
Missouri State Highway Patrol,
Superintendent
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion from this department as of February 9, 1944, which opinion request reads as follows:

"Attached is copy of letter received from Captain F. D. Hagan, Commanding Officer of Troop D, Springfield, wherein an opinion is requested.

"Subject: Request for Attorney General's opinion

"To : Commanding Officer
Missouri State Highway Patrol
Jefferson City, Missouri

"1. After receiving the opinion from the Attorney General's Office, rendered by B. Richards Creech, I request another opinion be sought to clarify certain points of the Law under the following circumstances of Section 8369, of the Revised Statutes of Missouri as recently enacted. Particularly No. 4 relating to "local commercial motor vehicles" as set out on page 666 of the 1943 Sessions Act.

March 3, 1944

"2. John Doe lives in town and has three (3) trucks upon which he depends for his living. Two of these trucks he operates hauling live stock to the market, a distance of one hundred miles, and supplies for the farmers back to the farm. The third truck is operated hauling crushed lime, "farm supplies", from a crusher to the farmers in that territory, some distances as great as fifty miles. Can all or either of those trucks be classified as local commercial motor vehicles under the above Section?

"3. Secondly, let's assume that John Doe lives on a farm and operates the farm himself, and hires drivers for the operations outlined above. Would there be any difference in the application of the Exemption?

"4. Under No. 4, it states when controlled or operated by any person or persons principally engaged in farming when used exclusively in the transportation of agricultural products or live stock to or from a farm or farms, or in the transportation of supplies to or from a farm or farms.

"5. Under the Conclusion by B. Richards Creech, he states any person or persons owning a truck which is principally used in the transportation of agricultural products or live stock to and from a farm or farms, or in the transportation of supplies to or from a farm or farms, is a "local commercial motor vehicle" within the meaning of Section 8369, Laws of Missouri, 1943, page 666.

"6. This opinion does not limit the operations to a person or persons principally engaged in farming. I am interested to know to what extent a person or persons can become interested in trucking farm products and supplies, and still be considered principally engaged in farming.

F. D. Hagan, Captain
Commanding Troop "D".

March 3, 1944

We herewith copy the pertinent part of Section 8369, Laws of Missouri, 1943, page 664-666:

"(a) Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this State, shall except as herein otherwise expressly provided, cause to be filed, by mail or otherwise, in the office of the Commissioner, an application for registration on a blank to be furnished by the Commissioner for that purpose, containing: (1) a brief description of the motor vehicle to be registered, including the name of the manufacturer, the motor number and character, and amount of motive power, stated in figures of horsepower; (2) the name, residence and business address of the owner of such motor vehicle; (3) if said motor vehicle be a commercial vehicle the weight of the vehicle and the desired load in pounds; (4) if such motor vehicle be a specially constructed or reconstructed motor vehicle, the application shall so state and the owner shall furnish the Commissioner such additional information as he shall require.

"(b) Upon the filing of such application, exhibition of certificate of ownership and the payment of the fees hereinafter provided, the Commissioner shall assign a number to such motor vehicle, and without other expense to the applicant shall issue and deliver to the owner a certificate of registration in such form as the Commissioner shall prescribe, and a plate, or set of plates, bearing such number.

"(c) Registration fees made payable to the State Treasurer shall be remitted to the Commissioner with the application for registration for the remainder of the calendar year on the basis of the license fees now provided by Section 8369 and Section 8370, Revised Statutes of Missouri,

1939; the license fees provided by this Act shall become effective on and after January 1, 1944.

"For motor vehicles other than commercial motor vehicles and motorcycles and motortricycles:

* * * * *

"For commercial motor vehicles having a gross weight of:

| | |
|----------------------------------|---------|
| Under 1,500 pounds..... | \$10.00 |
| 1,500 pounds to 10,000 pounds.. | 15.00 |
| 10,000 pounds to 12,000 pounds.. | 20.00 |
| 12,000 pounds to 18,000 pounds.. | 30.00 |
| 18,000 pounds to 20,000 pounds.. | 40.00 |
| 20,000 pounds to 22,000 pounds.. | 50.00 |
| 22,000 pounds to 28,000 pounds.. | 65.00 |
| 28,000 pounds to 32,000 pounds.. | 100.00 |
| 32,000 pounds to 38,000 pounds.. | 125.00 |
| 38,000 pounds to 42,000 pounds.. | 150.00 |
| 42,000 pounds to 44,000 pounds.. | 175.00 |
| Over 44,000 pounds..... | 200.00 |

"For each trailer or semi-trailer there shall be paid a fee of three dollars (\$3.00). The fees for tractors used in any combination with trailers or semi-trailers or both trailers and semi-trailers shall be computed on the total gross weight of the vehicles in the combination with load.

"The annual license fee required by this article is intended to cover only the motor vehicle for which it is issued; the Commissioner may, however, on application, when a licensed motor vehicle has been destroyed or replaced by another motor vehicle of the same licensed weight or less, transfer said annual license; in cases where the substituted vehicle is of larger gross weight, the applicant must pay an additional sum equivalent to the difference between the annual license fee for the original motor vehicle and the annual license fee for the substituted motor vehicle.

"Eighty-five (85) per cent of such registration fees shall be credited against any fees charged by the Public Service Commission of this State for the transportation of persons or property.

"License taxes may be levied on motor vehicles by municipalities of this state provided that the fees charged by municipalities for said license shall not exceed the amount authorized therefor by said municipalities during the year 1933.

"For each local commercial motor vehicle there shall be paid a fee equal to one-third of the fee specified above for other commercial motor vehicles, PROVIDED, HOWEVER, no vehicle fee shall be less than \$10.00.

"The term 'local commercial motor vehicle' includes every 'commercial motor vehicle' as defined in Section 8367, Revised Statutes of Missouri, 1939, while operating within this state and used for the transportation of persons or property:

"1. Wholly within any municipality or urban community,

"2. Wholly within any municipality or urban community and a zone extending 25 air miles from the boundaries of any municipality or urban community, or contiguous municipality or urban community, or

"3. In making hauls not exceeding 25 miles in length, or

"4. When controlled or operated by any person or persons principally engaged in farming when used exclusively in the transportation of agricultural products or live stock to or from a farm or farms, or in the transportation of supplies to or from a farm or farms.

"Each commercial vehicle shall prominently display in a conspicuous place on said vehicle the name of the owner thereof, the address from which such motor vehicle is operated and the weight for which said motor vehicle is licensed; PROVIDED FURTHER, that local commercial vehicles, in addition to the above information, shall prominently display on such vehicles in a conspicuous place the word 'Local'."

Further, we wish to call attention to Section 8370, which reads as follows:

"(a) In determining fees based on the horsepower of vehicles propelled by internal combustion engines, said horsepower shall be computed and recorded upon the following formula established by the National Automobile Chamber of Commerce:

"Square the bore of the cylinder in inches, multiplied by the number of cylinders, divided by two and one-half.

"(b) The horsepower of all motor vehicles propelled by steam may be accepted as rated by the manufacturers thereof, or may be determined in accordance with rules and regulations promulgated by the commissioner.

"(c) The horsepower of all motor vehicles, except commercial motor vehicles, propelled by electric power, shall be rated as being between 12 and 24 horsepower.

"(d) In the computation of fees on commercial motor vehicles, in the case of freight or merchandise motor vehicles, the manufacturer's rated live load capacity shall govern and in case of passenger vehicles the capacity shall be ascertained by multiplying the number of the adult seating capacity by one hundred and fifty pounds.

"(e) The decision of the commissioner as to the type of motor vehicles and their classification for the purpose of registration and the computation of fees therefore shall be final and conclusive."

It will be noted from the reading of Section 8369, as that section appears in the Laws of 1943, that said section is nearly identical with section 8369 as it was written and appeared in the Revised Statutes of 1939, up to the portion of the Section commencing "* * * * *Commercial motor vehicles having a gross weight of * * * * *", the only change in the section up to the quoted portion of the section, supra., being in subdivision C, which is not material to this opinion and therefore not particularly pointed out.

Therefore, we must conclude at the outset that the Legislature, through the reenactment of Section 8370, in the Laws of 1943, without doubt intended that provisions of 8370 should apply to Section 8369, as the same was enacted in the Laws of 1943.

We wish to call attention to Section E., Section 8370, which paragraph reads as follows:

"(e) The decision of the commissioner as to the type of motor vehicles and their classification for the purpose of registration and the computation of fees therefore shall be final and conclusive." (Underscoring ours.)

It will be noted from the reading of this paragraph E., that the wording thereof is specific and unambiguous and gives the commissioner the sole determination of the matters and things specified in said paragraph. We further wish to point out that no place in the Laws of 1943 or in the Revised Statutes of Missouri for the year 1939, or subsequent laws, has the Legislature seen fit to in any wise curb the power given to the commissioner under paragraph E, and it will be further noted that no appeal or certiorari to any Court has been granted. We further wish to point out that there is no provision contained in

March 3, 1944

Article 1, Chapter 45, Revised Statutes of Missouri, 1939, of which Article Section 8369 and 8370 are a part, setting up a penalty for a violation of Section 8369 or 8370. In fact, as is heretofore pointed out, the decision of the commissioner is final and conclusive.

It will be observed from reading the Revised Statutes of 1939, as well as the Laws of 1943, that there is not contained a section or sections allowing any Court to overthrow the decision of the commissioner when he has once made a determination under paragraph E of Section 8370. Neither is there contained any section providing what might constitute a violation of the provisions of 8369 or what Court would hear said violation, nor is there a penalty provided for or a section providing for the cancellation of the license. In other words, it is our view that the State Patrol as well as sheriffs and other law-enforcing officers of the State are absolutely powerless to do anything in regard to the licensing of motor vehicles under Section 8369 and 8370. However, we might call attention to paragraph H. of Section 8401, Revised Statutes of Missouri, 1939, which reads as follows:

"(h) False Statements: No person shall wilfully or knowingly make a false statement in any application for the registration of a motor vehicle or trailer, or as a dealer, chauffeur or registered operator, or in an application for or assignment of a certificate of ownership. All blanks or forms issued by the commissioner for the purpose of making application for registration of certificate of ownership shall conspicuously bear on the face thereof the following words: 'Any false statement in this application is a violation of the law and may be punished by fine or imprisonment or both.'"

It is our view that this later section would apply, should an applicant wilfully or knowingly make a false statement in his application for the motor vehicle or trailer in applying for a license under Section 8369, R. S. Mo., 1939.

March 3, 1944

CONCLUSION

It is the opinion of this department that the decision of the commissioner of motor vehicles, as to the type of motor vehicle, their classification for the purpose of registration, and the computation of fees therefore, shall be final and conclusive on all licenses issued by the commissioner of motor vehicles pursuant to the provisions of Section 8369, Laws of Missouri for the year 1943, pages 663, 664, 665, and 666.

Respectfully submitted,

E. RICHARDS CREECH,
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

BRC:ml

County Collector:

SCHOOL FUNDS: Forfeited commissions and penalty adjudged against Collector for failure to timely account for tax collections goes into county public school fund.

April 10, 1944.



Mr. J. R. Gideon,
Prosecuting Attorney
Taney County,
Forsyth, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of January 27, 1944, requesting our opinion on the following:

At the October, 1942, Term of Circuit Court in Taney County, a judgment for \$180.00 was rendered against a former collector under the terms of Section 11099, R. S. Mo. 1939, which provides:

"If any county collector, or ex officio county collector, shall fail or refuse to pay the taxes and licenses into the state and county treasuries, as provided in the preceding section, he shall forfeit his commissions thereon, and in addition thereto shall pay a penalty of ten per cent of the amount thereof,* * *".

The collections which the collector failed to pay into the treasuries as required were made during February, 1943, but were not paid over until sometime after the period fixed by law. In making the delinquent payment into the treasuries the collector retained his usual commissions out of the tax collected together with penalties collected off delinquent taxpayers as provided by law. These commissions were as follows: Commissions on collections deducted out of taxes collected \$108.18, and Commissions collected from taxpayers in the form of penalties for delinquency \$55.48, totaling \$163.66. This sum, plus ten per cent thereof (\$16.34) added as a penalty under Section 11099, supra, constituted the \$180.00 judgment. Upon payment of this sum into court by the former collector in satisfaction of the judgment, it was turned into the county school fund on the theory it was a penalty, forfeiture or fine within the meaning of those terms as used in Section 8, Article II of the Constitution.

You desire to know whether this action was proper. Section 8, Article II of the Constitution provides:

"* * * the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the State, * * * shall belong to * * * a county public school fund* * *."

We think this opinion turns on the meaning of "penalties and forfeitures" as used in this section; and in this connection we wish to point out that Section 11099 states that the commissions shall be "forfeited" and a ten per cent "penalty" imposed where the collector is delinquent.

In *Barnett v. Atlantic & Pacific R. Co.*, 68 Mo. 56, at l.c. 64 it said of Section 8, Article II, that:

"This section clearly refers to penalties accruing to the public* * *."

Next we desire to point out that "fines" for breaches of the penal (i.e. criminal) laws are specifically mentioned so it therefore would seem that the terms "penalties and forfeitures" were intended to cover something other than fines imposed for the commission of crimes. In *Kaes v. Railroad*, 6 Mo. App. l.c. 405, it is said:

"The Constitutional provision * * * whereby 'the clear proceeds of all penalties and forfeitures' are directed to go into the public school fund, evidently applies only to penalties and forfeitures actually collected by the public county authorities."

Again in *State v. Railroad*, 253 Mo. 642, in a concurring opinion (l.c. 657) it is stated:

"That the law necessarily involves the idea of punishment and to that end employs language (the word 'forfeit') appropriate only to a penalty, that the penalty is directed to the punishment of a public wrong as contradistinguished from a private wrong* * * I think, is clear. That the 'clear proceeds' of such penalty belong to the public school funds and that no such penalty can be created payable to any other object or to any person without violating the Constitution, is also clear."

April 10, 1944.

We think under the foregoing the forfeited commissions, as well as the penalty imposed on the collector properly were placed in the county school fund. They were imposed as punishment for a public wrong, that is, the failure to pay over when required. The money was collected by the public county authorities under Section 11099, supra. The statute (Sec. 11099) under which it was collected terms it as "forfeiture" and "penalty", and with complete silence in the law as to the disposition of the sum collected we think it is permissible to assume that it accrues to the public.

It thus appears that the standards heretofore used in determining what are "penalties" and "forfeitures" under Section 8, Article II are all applicable to the instant case.

CONCLUSION.

It, therefore, is our opinion that where a collector is delinquent in paying over taxes, the forfeited commissions and penalty adjudged against him under Section 11099, shall, when paid, be placed in the county school fund.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney-General.

SCHOOLS: House Bill 227, Laws of Missouri, 1941, authorizes a common school district adjacent to a consolidated district to become consolidated with such consolidated district in a certain manner.

January 20, 1944.



Honorable Arthur U. Goodman, Jr.
Prosecuting Attorney
Kennett, Missouri

Dear Mr. Goodman:

The Attorney-General wishes to acknowledge receipt of your letter of January 11, 1944, in which you request an opinion from this department. This opinion request, omitting caption and signature, is as follows:

"Please furnish me an official opinion covering the following proposition, namely:

"Can a part of a common school district attach itself to or consolidate with an adjoining consolidated school district, and, if so, what is the proper procedure to be followed?"

In answer to your request as set out above, we wish to call your attention to House Bill 227, found on page 545, Laws of Missouri, 1941, as follows:

"Section 1. Adjacent districts may be consolidated and elect board members--how.-- Adjacent city, town, or consolidated school districts, without limitations as to size or enrollment, or one or more of the above mentioned districts and one or more adjacent common school districts may be organized into a consolidated school district for the purpose of maintaining elementary schools and high schools. Elections for the purpose of perfecting such consolidation shall be called by the county superintendent of schools of the county wherein

said districts lie, or jointly by two or more county superintendents if said districts lie in more than one county, on receipt of a petition signed by at least fifteen qualified voters from each district to be included in the proposed consolidation. Elections shall be called by posting in at least five public places in each of the original districts, notices stating the place, time, and purpose of such election. Said notices shall be signed by the county superintendent or superintendents issuing call and shall be posted at least fifteen days prior to said election. Separate elections shall be held on the same day in each district of the proposed consolidation. Each district election shall be conducted in the manner provided by law for that particular type of district. The results of these elections shall be certified to the county clerk or clerks and the county superintendent or superintendents of schools by the clerk and the president of the board of each of the respective districts. The county superintendent of the county in which the major portion of the proposed consolidated district is located shall within ten days declare the consolidation in effect, if the proposition received a majority of all votes cast in each district. He shall then prepare for the county clerk of his county a plat of the new district. He shall within ten days after certification of consolidation post notices for election of board members of such new district. For this purpose he may designate presidents of boards of original districts to direct election procedures which are to be conducted in the manner designated by law for consolidated districts. The directors of said consolidated district shall organize as per the provisions designated in Section

10470, and shall immediately assume charge of all school property lying in the consolidated district, and shall for said district assume all legal obligations of the component districts; provided, that should the proposed consolidation fail to carry, no new election for the purpose of consolidating the same districts may be held within a twelve-month period; and provided, further, that should any county superintendent fail or refuse to perform any of the duties enjoined upon him by this act, the State Superintendent of Schools shall perform such duty or duties."

We construe the above provision as authorizing a common school district to become attached to a consolidated district which is adjacent. However, in order that such consolidation take place, the procedure as outlined in the above statute should be followed.

It is necessary as a first step that there be presented to the superintendent of schools in the county in which the consolidation is requested, or if in more than one county, the superintendents of the schools of the different counties, a petition signed by at least fifteen taxpayers of both the common school district and the consolidated school district. After such petition has been presented, the superintendent of schools shall call elections in such school districts for the purpose of deciding whether or not the consolidation shall take place. The notices shall be signed by the county superintendent or superintendents. If the results of the election are favorable to the attachment of the common school district to the consolidated school district, it then becomes the duty of the superintendent of the county in which the major portion of the proposed consolidated district is located, to declare that the proposed consolidation is in effect. The statute cited above also sets out some other procedure which, however, can be understood by the reading of such statute.

It will be noted that in your request you ask whether or not a part of a common school district may attach itself to

January 20, 1944

or consolidate with an adjoining consolidated school district. We feel that by a study of the first sentence in the section of the Laws of 1941, cited above, it will be seen that the Legislature did not provide as to a part of a common school district but provided for one or more common school districts. It is our opinion that in order for a common school district to become attached to a consolidated district, it is necessary that the entire common school district be consolidated and we do not feel that there is any provision that a part of such school district can become consolidated with an adjacent consolidated district.

Conclusion.

Therefore, it is the opinion of this department that a part of a common school district cannot attach itself to or consolidate with an adjoining consolidated school district. It is further the opinion of this department that a common school district adjacent to a consolidated district may, by a favorable vote of the people in both the common school district and the consolidated school district, become a part of such consolidated school district.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

Criminal Law: Admissibility of evidence of prior offenses
and of charges under different statutes.
Election of count in information.

April 5, 1944



Honorable Arthur U. Goodman, Jr.
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Mr. Goodman:

This is an acknowledgement of your inquiry addressed
to the General, relating to Criminal Law, which is as follows:

"I have two criminal cases pending in which
an appeal will likely be taken if defendants
are convicted. Therefore, I am asking for an
opinion on these points:

(1) In a prosecution for selling liquor with-
out a license, where the information does not
name the purchaser and alleges the offense to
have occurred on the _____ day of November, 1943,
can the State prove on the trial different sales
within three years prior to the filing of the
information?

(2) In a prosecution for uttering, with intent
to defraud, a forged check drawn on a bank, is
evidence admissible tending to prove that de-
fendant forged the check?

(3) In the uttering case mentioned under (2)
could I not go to trial on both counts (forgery
& uttering) without being required to elect or
dismiss one count until all of the evidence for
both sides was closed?

In the case of State v. Jones, 164 S.W. (2d) 85, 89
the Supreme Court held:

"It is the general rule that evidence of other
crimes independent of that for which defendant
is on trial is inadmissible, but, 'the general

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rule does not apply where the evidence of another crime tends directly to prove guilt of the crime charged. Evidence which is relevant is not rendered inadmissible because it tends to prove him guilty of some other crime.' State v. Flores, 332 Mo. 74, 55 S.W. 2d. 953, 955; State v. Krebs, 341 Mo. 58, 106 S.W.2d 428; State v. Patterson, 347 Mo. 802, 149 S.W.2d 332. Therefore, it may be said as stated in Wharton's Criminal Evidence, 11th Edition, page 487, Section 345:

" * * * If the other crime and the crime charged are so linked together in point of time or circumstances that one cannot be fully shown without proving the other, regardless of whether the crime incidentally shown is of the same or a different character from the one on trial, the general rule of exclusion does not apply. * * * if evidence is competent, material and relevant to the issue on trial it is not rendered inadmissible merely because it may show that the defendant is guilty of another crime!"

In passing upon exceptions to the rule, stated in the above case, the court, in State v. Hepperman, 162 SW (2d) 878, 884-5, held:

"Space does not permit of an exhaustive analysis of the rules and reasons underlying them for the admissibility of evidence which shows or tends to show the commission of an offense other than the one for which the defendant is on trial, suffice it to say that there are certain instances and crimes in which such evidence is admissible even though it may be prejudicial to a defendant's acquittal as evidence pointing to his guilt often is. But, if the proof of another offense logically proves knowledge, intent or design in the commission of the offense charged and for which the defendant is on trial such evidence

may be admissible. Or it may show motive, the identity of the defendant as the perpetrator of the crime charged or it may be an act inseparable from the act charged, in which event evidence tending to show the defendant guilty of another crime is admissible. Or, if the evidence tends to establish the charge for which the defendant is on trial it is admissible though it prove him guilty of another offense. State v. Gruber, Mo. Sup. 285 S.W. 426; State v. Wolff, 337 Mo. 1007, 87 S.W. 2d 436; State v. Krebs, 341 Mo. 58, 106 S.W. 2d 428; 2 Wigmore, Evidence, Secs. 300-365, particularly Sec. 363, relating to murder by poison."

The general rule, above stated, was applied in the case of State v. Whitener, 46 S.W. (2d) 579, 581 in the following language:

"We agree with the contention that the trial court erred in admitting the testimony of the State's witness Mary J. Settle which tends to connect the defendant with the theft of cattle belonging to said witness and her husband, in July, 1928. This testimony was not competent for any purpose and was highly prejudicial to the defendant."

Such was the holding of the court in a liquor case in State v. Wilcox, 44 S. W. (2d) 85, 89, in the following language:

"The Attorney General in his brief confesses prejudicial error of the trial court in admitting evidence of the sale of liquor and the operation of the still which witnesses testified occurred in 1927 and 1928 in the clump of willows near the Missouri river, about fifteen miles distant from the Barnhart farm. We are of opinion that these were separate offenses, and that the testimony concerning them was prejudicial. In violations of the prohibition law, criminal intent is not as a rule a necessary element. A defendant who

manufactures or sells moonshine liquor violates the law, regardless of intent. State v. Seidler (Mo. Sup.) 267 S. W. 424; State v. Fenley, 309 Mo. 545, 275 S. W. 41; State v. Presslar, 316 Mo. 144, 290 S. W. 142. As was said by this court, Judge Walker speaking, in State v. Fenley, supra, 309 Mo. 545, 275 S. W. loc. cit. 44: 'Where, however, the facts are such that the defendant was bound to know the nature and character of his act, as he was in this case, proof of other offenses is not admissible to show intent.'

"Since it thus appears that evidence of other offenses is not admissible in liquor cases to show intent, such evidence is prejudicial error in this case. State v. Young, 119 Mo. 495, 24 S. W. 1038; State v. Vandiver, 149 Mo. 502, 50 S. W. 892; State v. Hale, 156 Mo. 102, 56 S. W. 881; State v. Hyde, 234 Mo. 200, 136 S. W. 316, Ann. Cas. 1912D, 191; State v. Duff, 253 Mo. 415, 161 S. W. 683; State v. Banks, 258 Mo. 479, 167 S. W. 505."

Therefore, it is the opinion of this department that evidence which shows, or tends to show, the commission of an offense other than the one for which the defendant is on trial is not, as a rule, admissible. However, such evidence may be admissible, as exceptions to such rule, when offered for the purposes stated in the above decisions.

II and III

Forgery of checks or orders on any bank, and uttering forged checks, are two distinct, separate offenses, provided in different sections of the statutes. Both are felonies. However, in your case, both charges relate to the same check.

Therefore, the above rule would apply in the admission of evidence to prove such charges. However, such evidence may be admissible in such cases when offered for the purposes recited in the above decisions as exceptions to the rule.

April 5, 1944

The case of State v. Collins, 297 Mo. 257, was instituted by information in two counts: first, charging forgery of a note and secondly, charging the writing and selling of such note. The court on page 261 said:

"***The defendant at the beginning of the case, before evidence was introduced, filed a motion to require the State to elect on which count it would proceed to trial. This motion was overruled.

"At the close of the evidence offered by the State the defendant again filed a motion asking the court to require the State to elect upon which count it would stand, and the State elected to stand on the second count.

"There was no error in overruling the motion filed before evidence was introduced. The election between the two counts was entirely sufficient after the evidence was introduced.***"

In the case of State v. Gant, 335 S. W. (2d) 970, 971, the Supreme Court held:

"Generally, when an indictment or information contains two or more counts charging separate and distinct felonies, the state will be required to elect on which count it will proceed. State v. Guye, 299 Mo. 348, 252 S. W. 955; State v. Link, 315 Mo. 192, 286 S. W. 12, and cases cited; State v. Presslar, 316 Mo. 144, 290 S. W. 142. But, where the different counts relate to the same transaction and involve the same facts and are so far cognate that a conviction under one count will bar a prosecution for the offense charged in the other, it appears that two or more counts may be joined in one indictment or information even though the acts charged may be violations of different sections of the statute and may constitute different offenses, in which case the court may in its discretion submit both or all of the counts to the jury under appropriate

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instructions, but the jury must be instructed that there can be a conviction only under one count. Doubtless if the circumstances were such that failure to require an election would operate prejudicially to a defendant's rights, it would be error for the court to refuse to require it. The rule frequently quoted with approval by this court was thus stated in *State v. Christian*, 253 Mo. 382, 394, 161 S. W. 736, 739, that, except where otherwise provided by statute, 'only such offenses may be joined as arise out of the same transaction and which are so far cognate as that an acquittal or conviction for one would be a bar to a trial for the other.' In view of other statements in that opinion and of other decisions of this court, it would seem that the rule as above quoted, while in general correct, is in one respect inaccurately stated, if it is meant that the offenses must be such that an acquittal of the offense charged in one count would be a bar to prosecution for the offense charged in the other count had they been separately charged. In the same opinion (*Christian Case*) the court says: 'We have held, however, that a count for forgery may be joined with a count for uttering the instrument forged (*State v. Carragin*, 210 Mo. 351, 109 S. W. 553, 16 L. R. A. (N.S.) 561,***"

Therefore, it is the opinion of this department that the trial court may in its discretion submit both of the mentioned counts to the jury under appropriate instructions, providing that he instruct such jury that there can be a conviction only under one count.

However, if the circumstances of such case"were such that failure to require an election would operate prejudicially to defendant's rights, it would be error for the Court to refuse to require it."

APPROVED:

Respectfully submitted,

ROY MCKITTRICK
Attorney GeneralEDGAR B. WOOLFOLK
Assistant Attorney-General

EBW:CP

COPY

GENERAL ELECTION: Where political party fails to nominate a person for County Surveyor, County Clerk shall provide proper space on the ballot for voters to write in name of person they desire to be elected for such office.

September 23, 1944



Honorable Arthur U. Goodman, Jr.,
Prosecuting Attorney,
Dunklin County,
Kennett, Missouri.

Dear Sir:

We are in receipt of your letter of September 18, 1944, wherein you request an opinion from this department, which request reads as follows:

"In the General Election held in November, 1940, Chas. C. Redman, Jr. was duly elected on the Democratic ticket as Surveyor of Dunklin County; and he thereafter qualified as such. In December of 1940, being an officer in the National Guard, he was mustered into the Army, has been there ever since, and is now a Lieutenant Colonel. He did not file as a candidate in the Democratic primary this year, as Army regulations prevented his doing so, as he was not trying to avoid the payment of a filing fee. Quite a number of his friends wrote his name in on the Democratic ticket as the candidate for County Surveyor, but under your opinion of some time ago the County Clerk is not printing his name on the ballots as Democratic nominee for County Surveyor. There is no Republican candidate for County Surveyor. I understand the ballots will not contain a space for or mention of a candidate for County Surveyor. If the Republicans write in a few votes for some Republican for County Surveyor will he thereby become elected? Will 'write-in' votes be counted as valid votes in the General election of November, 1944?"

We call attention to Section 11595, Revised Statutes of Missouri, 1939. This is a very lengthy section setting forth the form of the ballot and how it shall be prepared. We do not quote the whole of this section, but particularly call attention to the following wording contained therein:

" * * * * Three-eighths of an inch below the name of each candidate shall be printed a horizontal hair line extending across the ballot in such manner that names on all the lists of candidates for like offices shall appear between the same horizontal lines: * * * *."

Section 11595 also sets forth a form to be followed in preparing the ballot, and particularly shows the hair line set out above.

Next, we call attention to Section 11603, Revised Statutes of Missouri, 1939. This section has to do with how the voters shall vote the ballot prepared in accordance with Section 11595, supra. We find this wording contained in Section 11603:

"* * * * If the voter desires to vote for one or more candidates whose name or names do not appear on the printed ballot he may do so by drawing a line through the printed name of candidate for such office, and writing below such cancelled name the name of person for whom he desires to vote, and placing a cross mark in the square at the left of such name. The squares so marked shall take precedence over the cross marked in the circle. * * * *"

In your opinion request you state that there has been no candidate duly nominated for the office of County Surveyor by either party in your county. The situation then will be that your ballot will proceed as though one had been nominated, however there will be no name to the right of the box on either the Democratic or Republican ticket. Underneath, where there is usually the name of the nominated candidate, there shall also appear the hair line as provided in the two sections, supra.

It is our view that the voters, both Republicans and Democrats, will unquestionably have the right to write in the name of whomever they see fit for the office of County Surveyor, and it shall be the duty of the election judges to count and tally the names so written in as they would for the other persons whose names usually appear on the ballot. Whichever person procures the highest number of votes shall be declared elected to the office of County Surveyor of Dunklin County.

To sustain our position we call attention to the case of Bowers vs. Smith, 111 Mo. 45, 1.c. 52, wherein the court said:

" * * * * The new ballot law cannot properly be construed to abridge the right of voters to name their public servants at such elections, or to limit the range of choice (for constitutional offices) to persons nominated in the modes prescribed by it. Nominations under it entitle the nominees to places upon the official ballots, printed at public expense; but the Missouri voter is still at liberty to write on his ballot other names than those which may be printed there.

"The statute recognizes this right by requiring sufficient blank space for such writing, next to the printed names of candidates for each office. Revised Statutes, 1889, sec. 4773."

The history of Section 11595 shows that this is the same section and that the different amendments of the section since 1889 have not changed this portion of the section referred to in the Bowers case, supra.

Again quoting from the dissenting opinion in the case, we call your attention to the following:

"But it is argued that the constitution secures to every voter the right to cast his ballot for whom he pleases. Certainly this is not denied, and, in order that he may not be restricted simply to those candidates whose names are printed on the official ballot, it is expressly provided

in section 4773 that 'at the end of the list of candidates for each office shall be left a blank space large enough to contain as many written names of candidates as there are offices to be filled.' We agree with counsel for appellee that if this new election law of May 16, 1889, should restrict the election to the names printed on the official ballot, and made no provision for his substituting any name he chose for any office to be chosen it would be unconstitutional. On the contrary, it has expressly guarded against that in section 4773 by leaving space for him to write the names of as many candidates as there are offices to be filled."

CONCLUSION

It is the opinion of this department that in view of the fact that no person has been nominated for the office of County Surveyor in Dunklin County to be elected in the 1944 General Election, it is the duty of the County Clerk, in preparing the official ballot to be used by the voters at said General Election, to see that the ballot contains a space for the office of County Surveyor on all party tickets contained on said ballot; that opposite the box on said ticket no printed name shall appear, and that underneath said space where a name would appear if a person had been nominated there shall also appear a hair line.

Further, the voters of Dunklin County will thereby be enabled to express their desires as to who shall be elected to the office of County Surveyor of Dunklin County, and such names so written in by the voters shall be counted and tallied as other persons whose names appear on said ballot as nominees to the several offices to which they aspire.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
Acting Attorney General

Filling of vacancy in office of School
; Director of Consolidated School District
: at annual meeting, a void act, where
SCHOOLS : notice under Section 10418, R. S. Mo., was
: not given beforehand.

March 24, 1944



Honorable Charles S. Greenwood
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Mr. Greenwood:

This is in acknowledgment of your letter of March 15, in which you request an opinion on the subject of schools, from this office. The text of your letter is as follows:

"Some taxpayers in a Consolidated School District in this County have consulted me with respect to their rights and remedy, if any, based upon the following facts:

"In September, 1942, one of the directors in said district walked out of a Director's meeting with a statement to the effect that he would no longer have anything to do with the Director's meetings, thereby, I think, creating a vacancy in the Board.

"In preparing the notice for the annual meeting of the voters to be held in April 1943, notice was given that among other business to be transacted would be the election of two directors (whose terms regularly expire) at that time, but gave no notice of any intention to elect a third member to fill the vacancy caused by the refusal to serve of the third director whose term would not be up until two years; but at the annual meeting without any notice being given of an intention to fill the vacancy at the Election, the voters elected three members of the Board, two of whom were elected for the purpose of succeeding the director whose term expired at that time; the other whom was to

fill the supposed vacancy on the Board. This third member is not performing the duties of the director and his supposed term will not expire until following the School Election to be held in April, 1945.

"The question is, whether this director who was elected to fill the vacancy, without any notice having been given to the voters that the third director would be elected, can legally continue to hold the office, and if not, what the remedy, if any, would be as against him?

"I am not fully satisfied as to the answer that should be given to these people and I would appreciate it very much if you would advise me your opinion and conclusion based upon the above stated facts."

Section 10418, R. S. Missouri, 1939, provides:

"The annual meeting of each school district shall be held on the first Tuesday in April of each year, at the district schoolhouse, commencing at 2 o'clock p. m. If no schoolhouse is located within the district, the place of meeting shall be designated by notices, posted in five public places within the district fifteen days previous to such annual meeting, or by notice for same length of time in all the newspapers published in the district, giving the time, place and purposes of such meeting."

You will notice that this section requires "giving the time, place and purposes of such meeting." Inasmuch as a notice was not given to the voters of the proposed filling of this vacancy, there was no compliance with the terms of this section.

In State ex rel, School District v. Smith, 80 S. W. (2d) 858, the Court construed this section and states at page 860: "The purpose of a notice is to inform the voters of the propositions to be acted upon at the meeting. Where, as in this case, the statute requires a notice to be given, any action taken by the voters without notice or with an insuffic-

Mar. 24, 1944

ient notice is void."

You, therefore, still have not legally filled the vacancy in your school board. There are several methods of filling vacancies provided by the statutes of Missouri. One is under Section 10419, where the voters at the annual meeting elect a director to fill the unexpired term after proper notice under Section 10418; the other, under Section 10423, is by the Board of Directors appointing someone to fill the vacancy who would hold office until the next annual election. A person holding a public office illegally may be ousted by quo warranto.

Under Sec. 1782, R. S. Mo., 1939
State ex rel, v. Rose, 84 Mo. 198
State ex rel, v. Ellis, 329 Mo. 124
State ex rel, v. Baker, 104 S. W. (2d) 726.

CONCLUSION.

It is therefore the conclusion and opinion of this office that the filling of a vacancy in the office of school director for a consolidated school district at the annual school meeting when notice was not given of such an intention, as provided by Sec. 10418 R. S. Missouri, 1939, was a void act.

Respectfully submitted

ROBERT J. FLANAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RJF:LeC

CITIES. : Words "previous year" in Sec. 6976, R. S.
: Mo., 1939, refer to previous year in which
: city actually levied a tax.

July 7, 1944

8-7



Honorable H. J. Griffin
City Attorney
West Plains, Missouri

Dear Mr. Griffin:

This will acknowledge the receipt of your letter of June 24, requesting an opinion of this office, which is as follows:

"I am making this request as City Attorney of West Plains, Missouri.

"Please give me your opinion on Section 6976, Revised Statutes of the State of Missouri, 1939.

"The City officials of West Plains has not made a levy for taxes on personal or real estate located in said City since the year 1940. In other words there has been no levy made since the taxes for the year 1940. The levy for that year was 50¢ on the hundred dollar valuation.

"This section provides that the city council or any officer or officers acting therefor cannot order a rate of tax levy that will produce, mathematically, more than ten per cent in excess of the taxes levied for the previous year.

"The city council may want to make a levy for the year 1945 and we are at a loss to just know what rate we can levy. If the city council should decide to make a levy of fifty cents on the hundred dollar valuation for the year 1945, being the amount of the last levy made, would this be legal under this section?

"I will appreciate it very much if you will give me your opinion about this matter and thank you very much for same."

Section 6976, R. S. Mo., 1939, provides:

"The council may by ordinance and at the expense of the city cause to be taken a census of its population by a suitable person to be appointed by the governor of the state. When so taken the result shall be reported to the council and spread upon the records and a copy thereof certified by the city clerk, under the seal of the city, shall be filed with the secretary of state. If such report shows that such city has 30,000 inhabitants or more, the city council may levy upon all subjects and objects of taxation for city purposes not to exceed one hundred cents upon the one hundred dollar valuation. Should the population be less than 30,000 and over 10,000 inhabitants said rate shall not exceed sixty cents upon the one hundred dollars valuation. Should the population be less than 10,000 inhabitants said rate shall not exceed fifty cents upon the one hundred dollars valuation. the foregoing are maximum rates which may be levied in said cities. Provided, however, the city council shall not have power to order a rate of tax levy on real or personal property for the year 1921 which shall produce more than ten per cent in excess of the amount produced, mathematically by the rate of levy ordered in 1920, and in no subsequent year may any such city council or any officer or officers acting therefor, order a rate of tax levy that will produce, mathematically, more than ten per cent in excess of the taxes levied for the previous year. Provided, further, that the qualified voters of any such city, by a majority vote, shall have power to fix any additional rate higher than above provided for within the limits prescribed by the Constitution at a general election or a special election called for that purpose. City councils are hereby empowered to call and conduct a special election under the laws governing such elections as herein contemplated or submit a proposition for increase of levy, when in the opinion of such city council, necessity therefor arises, and shall submit any such proposition at either special or regular election when petitioned therefor by tax-paying citizens equaling in number one per cent or more of the qualified voters of the city, and the proposition shall be as follows:

Honorable H. J. Griffin

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July 7, 1944

'For a levy for city purpose of _____ on the one hundred dollars valuation,' and 'against a levy for city purpose of _____ on the hundred dollars valuation.'

The answer to your question would depend on an interpretation of the following clause "And in no subsequent year may any such city council or any officer or officers acting therefor, order a rate of tax levy that will produce mathematically, more than the ten per cent in excess of the taxes levied for the previous year." Inasmuch as you have not levied a tax since 1940, your question is whether the statute by "previous year" means the previous year in which a tax was levied or whether it means the immediately preceding year, which would be in this case, 1944. Your levy for 1940 was 50 cents on the hundred dollar valuation, which under the statute is the maximum levy for a city of the size of West Plains.

You made no levy for 1944, and therefore, if it were to be held that the words "previous year" meant preceding year, you probably couldn't make a levy, inasmuch as it could well be argued that 10% in excess of nothing, would still be nothing.

It doesn't seem that the legislature would have intended such a situation. The ten percent feature was not placed in the law to prevent the cities levying taxes, but to prevent a sudden jump in taxes.

The first paragraph of this statute gives cities the power to levy taxes. This is a general and permanent power. The later clause deals with the rate of increase. It does not give or take away the power to tax. To give it that feature would not be giving effect to the whole act. It is a cardinal rule as stated in *Graves v. Little Tarkio Drainage District No. 1*, 134 S. W. (2d) 70, that "effect must be given, if possible, to every word, clause, sentence, paragraph and section of a statute, and a statute should be so construed that effect may be given to all of its provisions, so that no part, or section, will be in operation, superfluous, contradictory or conflicting, and so that one section, or part will not destroy another.

Honorable H. J. Griffin

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July 7, 1944

It is also stated in State vs. Wurdanan, 274 S.W. 407:

"The courts will not give a statute construction which would render it unconstitutional, absurd, or unreasonable, when it is susceptible of a constitutional or reasonable one.* * *"

In Clark v. Lancaster County, 96 N. W. 594, 1. c. 599, the court said:

"To hold that in each use of the word the year referred to whether "current" or "previous" is the year from one levy to another, the year for which it is really made, seems more reasonable."

CONCLUSION.

It is therefore the opinion of this office that the words "previous year" as used in Section 6976 R. S. Mo., 1939, refer to the previous year in which taxes were actually levied by the city.

Respectfully submitted

APPROVED:

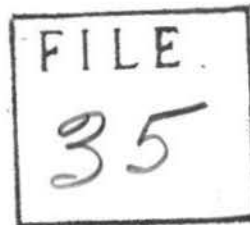
ROBERT J. FLANAGAN
Assistant Attorney General

ROY McKITTRICK
Attorney General

RJF:LeC

MUNICIPAL CORPORATIONS: Cities of the 4th class may acquire easement in street for storm sewer, and may maintain same after street is vacated for travel.

September 11, 1944



Mr. Percy W. Gullie
Prosecuting Attorney
Oregon County
Alton, Missouri

Dear Mr. Gullie:

Further consideration is here given to your letter of August 5 and the correspondence incident thereto all of which is as follows:

"Mr. Percy W. Gullie
Prosecuting Attorney
Alton, Mo.

Dear Percy:

We have a situation here that the Mayor asked me to write you about and ask if you would write the Attorney General for an opinion. It is this:

"In 1938 the City Board vacated a city street. It is the part of First Street on the hillside just behind the Wall Drug Store. Under the law as you know when a street or alley has been vacated by order of the City Board, the land so vacated goes back to the property from which it originally was taken. Well in this case Rufus W. McLelland owns the land in question. He has had a survey made and finds that across part of this vacated land is a city storm sewer. It runs across the front part on the alley. He has requested the city to remove the sewer. The question now is: can he force the city to move the sewer?. It was built across this land in 1922 when the land belonged to the city as a public street.

"I would appreciate very much if you would try to get an opinion for us from the Attorney General.

"Hon. Roy McKittrick
Attorney General
Jefferson City, Mo.

Friend Roy:

Mr. Percy G. Gullie

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September 11, 1944

"I am herewith enclosing a letter I have from the City attorney of Thayer, Missouri, requesting an opinion in said matter.

"Will you please forward me an opinion as soon as you find time, for which I will thank you very kindly.

"Also herewith I send you my congratulations, and sincere support for a great victory this fall."

"Mr. Percy W. Gullie
Prosecuting Attorney
Oregon County
Alton, Mo.

Dear Mr. Gullie:

"Your letter of August 5 has been received. Your letter states:

* * * * *

"Your letter is accompanied by the letter of Mr. T. W. Mesara, Attorney at Law of Thayer, Missouri which states:

* * * * *

"Your request for an opinion covering the subject matter stated in Mr. Mesara's letter is receiving attention by the writer to whom the matter has been assigned for writing the opinion.

"The writer has spent considerable time in studying the decisions of Missouri and other jurisdictions and other authorities on the principles involved in the question submitted.

"But the writing of an opinion that will be helpful in arriving at the correct solution of the problem involved will depend upon a statement of the facts in the case.

"It will be appreciated if you will supply this department with the following facts:

"(1) What method was followed in establishing the street in which the storm sewer is constructed? Was the street dedicated to public use by deed or by the filing of a plat dedicating the street as a part of an addition? Or was the use of the ground involved acquired by the city as a street by prescription.

"(2) Was the storm sewer constructed in the street ordered to be so constructed by ordinance, and, if so, was there any notice to the abutting property owners or any protest against its construction?

"(3) What proceedings were followed in vacating the street in 1938? Did the city pass an ordinance ordering the vacation of the street, or was there a petition filed in the County Court of Oregon County with notice to the abutting property owners?

"The purpose of requiring this information is to determine first where the title to the real estate formerly used as the street in question in the city of Thayer and upon which the storm sewer was constructed in 1922, and which was vacated, or attempted to be vacated in 1938, rests.

"The opinion to be later written on this question will depend very largely on the state of facts as they exist under the questions which have been stated. So please give us a complete and accurate statement of those facts as your earliest convenience."

"Mr. Percy W. Gullie
Prosecuting Attorney
Alton, Missouri

Dear Percy:

"The Attorney General asked for further information regarding the vacating of the street in question that I wrote you about some time ago. I will try to give the information that he desires.

"First: The street was originally dedicated to public use by plat when the town was first laid out. The plat is a matter of record.

"Second; The storm sewer was not ordered constructed by ordinance but the minutes of the City Clerk show

that the matter of construction was discussed with the property owners and it was agreed that the cost would be divided between the city and the property owners served by the sewer in that block. This was in the year 1922.

"Third: When the street was vacated in 1938 it was done by an ordinance of the City, but upon the petition of all the adjoining property owners in that block.

"I think this answers the questions asked by the Attorney General in his letter to you under date of August 15th."

"Hon. Roy McKittrick
Attorney General
Jefferson City, Mo.

Dear Sir:

I believe the above answers your questions in your letter hereto attached."

The letter of Mr. Mesara of August 25 in reply to my request for a statement of the method by which the ground constituting First Street in the City of Thayer was acquired by the city for a street, (2) whether the storm sewer in question was ordered constructed by ordinance, and (3) what proceedings were followed in vacating said First Street in 1938, states the following to be the facts, viz:

"First: The street was originally dedicated to public use by plat when the town was first laid out. The plat is a matter of record.

"Second: The storm sewer was not ordered constructed by ordinance but the minutes of the City Clerk show that the matter of construction was discussed with the property owners and it was agreed that the cost would be divided between the city and the property owners served by the sewer in that block. This was in the year 1922.

"Third: When the street was vacated in 1938 it was done by an ordinance of the City, but upon the petition of all the adjoining property owners in that Block."

Having relation to the facts stated in Mr. Mesara's letters, your letter requests an opinion from this department whether the abutting property owners can compel the City of Thayer to remove the storm sewer constructed in said First Street in 1922, in as much as said street was vacated by the city in 1938.

The text writers lay down the rule that a street may be established by following any one of several methods. Corpus Juris under the subject of Municipal Corporations, Volume 44, page 884, Section 3601, states:

"A street may be established as a public way by dedication, prescription, or statutory proceedings, and, as a general rule, a street can be established as a public highway only in these ways, although it is not necessary that the statutory course be pursued. * * * * *

18 Corpus Juris, under the subject of Dedication, page 58, Section 43, sets forth the rule of the establishment of a street by dedication as follows:

"Where the owner of real property makes a plat of it and divides the land into lots and blocks, intersected by streets and alleys, and sells any of the lots with reference to such plan, or where he sells with reference to the map of a town or city, in which his land is so laid off, he thereby dedicates the streets and alleys to the use of the public, * * * * *"
(Citing Missouri cases under note 14.)

The Supreme Court of Missouri, in the case of Rose et. al. v. City of St. Charles, 49 Mo. 509, l.c. 511 gave its sanction to this rule where it states:

"To show that the street filled by the city was so dedicated as to become public property, an agreement to dedicate it by a former owner of the property was offered in evidence against the objection of the plaintiffs. It is not necessary, in order to constitute a street or alley in a municipal corporation, that the statutory course should be pursued. Any act by the owner of property setting apart to the public a portion of his property, clearly showing that such was his intention, vests the use of such property in the public for the purposes indicated;

and if actually thrown open, the public may take possession. The usual course is to make a plan of a town or of an addition, setting apart streets, alleys, public squares, etc., and file a plat thereof with the recorder; but in the present case a contract was shown between the owner and purchasers of contiguous property, to dedicate certain streets of which the city has taken possession. The court correctly held this to be sufficient evidence of dedication. No ordinance is necessary. * * * * *

In the case of *Taylor et. al. v. City of St. Louis*, 14 Mo. 19, it is held That if any land was laid off by a proprietor as a part of a city and declared a part of the land as a public alley, no ordinance is required declaring that such is necessary. On this question the Court, *Id.* 22, held:

"This case falls within the principle settled by this court in *Gurno v. City St. Louis*, 12 Mo. R. 414. The facts as we may assume them from the instructions are not distinguishable from the case of *Callender v. Marsh*, 1 Pick., 418. The whole subject is very fully discussed in *Hooker v. New Haven & N. Co.*, 14 Conn. R. 146, and in the court of King's Bench in *the Governor and Company of the British Cast Plate Manufacturers v. Meredith*, 4 Yerger, 794.(a)

"In the present action, the street or alley in question was laid out by the plaintiffs themselves or their ancestor, and the probability of its being graded, when the public interest required it, must have been calculated on when the buildings were erected. To grade a street or alley, already dedicated to public use, is not an exercise of the eminent domain so as to require compensation. It is not appropriating private property to public use, but simply an exercise of power over what is already public property. The damage resulting, by causing the plaintiffs to rebuild or prop up their falling walls is consequential, and as it is a consequence of the exercise of a power granted by the State to municipal corporations, for public purposes, and the power has not been abused, but skillfully and discreetly exercised, the city authorities are not responsible.

"It is also objected in this case, that the alley in question had never been regularly declared by

ordinance as a public alley, previous to the passage of the ordinance which authorized its grading. This we think was unnecessary, since the proprietors had themselves, when laying off lands as a part of the city, declared it as a public alley.

(b) Judgment affirmed."

Our Supreme Court held in the case of Hatton et. al. v. the City of St. Louis, 264 Mo. 634, l.c. 643 as follows:

"The pleadings and proof in this case require an application of the law governing the right of a city to acquire streets and alleys by a statutory and a non-statutory dedication and of the rule relating to the effect upon such titles of adverse possession for the period of ten years.

"The dedication of so much of his estate as was shown on the properly executed, acknowledged and recorded plat made by George Buchanan in his lifetime was in strict statutory form and vested title to the streets and alleys therein designated, without any act on the part of the city and was thereafter irrevocable by the dedicator or his heirs. * * * * *

The Missouri Supreme Court announced the same rule in the case of The Town Of Otterville v. Bente et. al. 240 Mo. 291, l.c. 295, 296 where it said:

"It is contended that the title to the parts of Grover and Boonville streets involved in this controversy never vested in the public, because, it is said, the plat was not properly executed and acknowledged and no acceptance of the particular parts of the streets mentioned is shown.

"If the evidence that the plat was duly executed, acknowledged and filed in the office of the recorder of deeds of Cooper county was true, this was a statutory dedication of the streets, and the fee thereto vested at once in the public by force of the statute (Sec. 8, Chap. 158, R. S. 1855), and no further acceptance was necessary. * * * * *

"If the plat filed was defective and insufficient under the statute, it and the subsequent sale of lots thereunder, and building the town chiefly in this

addition on the lots along the streets laid out therein and the acceptance by the town and the public of most of the streets in their entirety and the major portion of Grover and Boonville streets themselves, coupled with the sale, according to the plat, as indicated by the evidence, of all the lots abutting on the parts of Grover and Boonville streets now in dispute, constituted a common law dedication and an acceptance of the plat in its entirety and the whole of all the streets as marked on the plat. * * * *

It thus appears that the street known as First Street in the City of Thayer was, in fact, "originally dedicated to public use by plat when the town was first laid out", and that "the plat is a matter of record". It is conclusive, under the decisions of our Supreme Court cited above that said First Street was a legally established public street in said City by dedication.

Moreover, aside from the question of the dedication of said street as a public street under the statutory proceedings of including it in the original plat of the city and the recording of the plat, and its actual opening as a street, it would appear to have become a legally established public street by prescription by user for more than ten years, even had there never been a formal dedication. The authorities hold that a street may be established by that method.

Corpus Juris, Volume 44, Section 3604, page 886 and 887 states the rule as follows:

"A street or an alley may be established by prescription, or long usage from which dedication and acceptance may be presumed, or from which the conclusive legal presumption may arise of establishment by competent authority. User by the public for more than forty years, or for more than twenty one years, or for more than twenty years, has been held sufficient as to time. So, user continuing for more than the time required by the statute of limitations to bar an action of ejectment may be sufficient, * * * "

The Kansas City Court of Appeals held to the same effect in the case of *McLemore v. McNeley*, 56 Mo. App. 556, L.c. 562 in the following language:

"As to the question of limitation, it is sufficient to say that it is now the well settled rule in this

state that the public may acquire the right to the use of a road or easement on the land of another where from long use thereof as such by the public, acquiesced in by the owner, and the adverse occupancy and use of the same for a period of time equal to that prescribed by the statute of limitations for bringing actions of ejectment."

It must, therefore, be held that the street in question was up to the time of its vacation in 1938, a lawfully established street, viewed either from the standpoint of dedication by recorded plat or of prescription by user for more than ten years. (See Section 1002, R. S. Mo. 1939, with ten-year statute of limitations for recovery of land).

The rule of law is announced by text writers and the courts of every jurisdiction that a municipality may use a street for any public purpose if it does not interfere with its use as a highway by the public.

Volume 44, Corpus Juris, pages 937 and 938, Section 3702, states:

"A municipality may use a street for any purpose not inconsistent with its use as a highway, and its rights are not limited to the mere surface of the street. For instance, it may lawfully use the streets for the construction of sewers, or for subways, or for drainage; * * * * *

McQuillin Municipal Corporations, 2nd Edition, Volume 4, page 407 and 408, Section 1553 holds that streets or alleys may be lawfully used for the construction of sewers and drains. The text of the citation states:

"Use of streets and alleys for sewers and drains. The right to the use of a public street or alley by a municipal corporation for sewer and drainage purposes is necessarily incident to the use for which streets and alleys are opened and laid out. Such use is proper and lawful, is not inconsistent with the object of their establishment, and is not an additional burden on the easement, entitling the abutting owners or the owners of the fee to compensation. A grant of power will be liberally construed to this end. Furthermore, municipal corporations may lay sewers in public streets, whether the land for the street was acquired by dedication or by condemnation proceedings. * * * * *

In 44 Corpus Juris, page 171, Section 2300 it is held that a lawful use to which streets may be subjected is the construction therein of sewers, drains, and water courses. Citing Heman Construction Company v. Lyon, 277 Mo. 628. The text announcing this is as follows:

"As in the case of other improvements a city may, under express or implied power to do so, build, construct, maintain, improve, and repair sewers and drains. While it has been said that the right to lay sewers and drains in a street is a privilege annexed by usage and custom as an incident to the rights of the public in them, the power to construct and maintain drains, sewers, and sewerage systems, being a proper municipal function, may be conferred on a municipality by constitution, statute, or charter, expressly or by implication."

The Supreme Court of Missouri in the case of St. Louis v. Terminal Railroad Assn. et. al. 211 Mo. 364, held that the City of St. Louis had the right to use its streets for a lawful purpose that would not interfere with travel. The Court, l.c. 390, said:

"It has been held by this court that the city has no right to give a railroad company a license to use a public street in such manner as to practically destroy its service as a public highway. * * * * * But that is not the condition which we are now to consider. The use that is designed to be made of Eighteenth and Twentieth streets by these approaches is an entirely public use, no one can make any use of it that every one cannot make; the approaches when constructed will be in their character as much public highways as the streets were before. * * * * *"

Our Supreme Court, in discussing the discretion that could be used by a municipality, under its implied powers, to construct a sewer system and to do all acts necessary to carry it into effect, in the case of Heman Construction Company v. Lyon, supra, l.c. 643, said:

"The exercise of that discretion with which the legislative department of the city was vested in authorizing an improvement of the character here in question was within reason. * * * * * The appellants were denied no substantial right and suffered no material injury. They were only required to bear a burden regularly imposed under the authority of the law. Of this they cannot complain."

It is stated in the statement of facts herein that the storm sewer in question was constructed in 1922. The statute in force at that time giving the Board of Aldermen in cities of the fourth class the power to make street improvements of or in the streets is Section 8512, R. S. Mo. 1919, which is as follows:

"The board of aldermen shall have power to create, open and improve any public square, public park, street, avenue, alley or other highway, old or new, and also to vacate or discontinue the same whenever deemed necessary or expedient: Provided, that all damages sustained by the citizens of the city or the owners of the property therein shall be ascertained as prescribed in that portion of this article relating to the condemnation of private property for public use; and provided further, that whenever any public square, street, avenue or alley, or other highway, shall be vacated, the same shall revert to the owners of the adjacent lots in proportion as it was taken from them; and when the grade of any street or alley shall have been once established by ordinance, it shall not be lawful to change such grade without making compensation to all persons owning real estate on such street or square, avenue, alley or other highway, who may be damaged by such change of grade, to be determined and governed in all respects, with reference to benefit and damages, as is provided in this article."

It would thus appear that the City of Tayer had ample authority to construct the storm sewer as a street improvement or under the exercise of its police power for the general welfare and health conditions of the city.

It also appears from the facts stated by Mr. Mesara that the City Clerk's record shows that the storm sewer in question was constructed in 1922 after the matter was discussed with the property owners, and under the agreement with the property owners in the block to be served by the improvement, and that the cost of the storm sewer would be divided between such property owners and the city. The City of Tayer has maintained this improvement, exercised control over it, and used it as an easement belonging to the city for more than ten years--indeed, more than twenty years--without interruption by a suit or otherwise by abutting property owners on the street vacated in 1938 where the storm sewer exists, and with not only the acquiescence but the participation in its construction by the then owners of property abutting upon said First Street.

19 Corpus Juris, page 876, under the title of "Easements" holds that a municipal corporation may acquire an easement. Section 21 states the rule as follows:

"The inhabitants of a town or city, in their corporate capacity, may prescribe for easements or other incorporeal rights to the same extent as individuals."

An easement such as is embodied in the use of First Street in the City of Thayer for a storm sewer may be acquired by prescription by user for ten years, and if so acquired becomes a vested right in the city.

Corpus Juris, Volume 19, page 893, Section 63 on this point has the following to say:

"Although it has been held that, in connection with other evidence, the adverse use of an easement for less than the prescriptive period may justify the presumption of a grant, the great weight of authority holds that, in order to acquire an easement by prescription, the user must be continued for the entire prescriptive period. This period, as heretofore shown, is in most jurisdictions the period limited for the acquisition of title to land by adverse possession, although most of these statutes do not in terms apply to prescriptive rights, but to the acquisition of corporeal hereditaments only. * * * * *

The case of Smith v. City of Sedalia, 152 Mo. 283 is cited as upholding the text of Corpus Juris above quoted under the ten-year statute of Missouri. That was a case in which Smith sued the City of Sedalia for damages for discharging sewage in a stream which flowed through his land. The city set up as a defense that it had acquired an easement by prescription so to do. Our Supreme Court, l.c. 297, held:

"The theory of the defense advanced both in the answer and instructions, is that the city has acquired by long use a prescriptive right to empty its sewage into Cedar creek. That a prescriptive right to maintain a nuisance of the kind complained of by the plaintiff in this case may be acquired, is a well established principle of law."

"The period requisite to establish such right is that which under the statute of limitations bars a right of entry which in this State is ten years. * * * *

The user, however, upon which the prescriptive right is founded must be adverse in its character; mere permissive user can not create such a right. The burden is upon him who asserts the right to show not only the user but that it was exercised adversely and under a claim of right.* * * And the user relied upon must not only be of the same general character, but must have been exercised substantially in as offensive degree and to as great an extent as at the time the suit is brought.* * * * *"

The case of Power v. Dean et. al. 112 Missouri Appeals, 288, is also cited in Corpus Juris under the same text. This was a suit involving the sole question of whether the plaintiffs had the right to an easement--the right to travel over it--on a small tract of land. The holding that an easement had been acquired by plaintiff to travel over such ground under the St. Louis Court of Appeal, l.c. 297, said:

"As she executed no deed, the argument is that an easement, or right to use the strip as a private way, was never granted, because such a grant must be by deed. This proposition is sound too. But an easement in the nature of a private way may be acquired by prescription or ten years' adverse use, which is equivalent to a grant.* * * The question of a prescriptive right depends on adverse use for the limitation period.* * * A right to the private way acquired by adverse use is a vested right and not a license.* * * *"

Therefore, under the facts as stated and the decisions of our courts and the authority of the text books quoted above, the City of Thayer acquired as an easement the vested right to maintain the storm sewer in the street in question by prescription by more than ten years' user, long before this street was vacated in 1938.

The fact is stated that the City of Thayer by ordinance, upon the petition of all the property owners of the block on the street wherein the storm sewer exists and is now complained of, vacated the street in 1938.

Section 7062, Article 8, Chapter 38, R. S. Mo. 1929, which was the statute in force at the time of the vacating of the street in question, is as follows:

"The board of aldermen shall have power to create, open and improve any public square, public park, street, avenue, alley or other highway, old or new, and also to vacate or discontinue the same whenever deemed necessary or expedient: Provided, that all damages sustained by the citizens of the city or the owners of the property therein shall be ascertained as prescribed in that portion of this article relating to the condemnation of private property for public use: and provided further, that whenever any public square, street, avenue or alley, or other highway, shall be vacated, the same shall revert to the owners of the adjacent lots in proportion as it was taken from them; and when the grade of any street or alley shall have been once established by ordinance, it shall not be lawful to change such grade without making compensation to all persons owning real estate on such street or square, avenue, alley or other highway, who may be damaged by such change of grade, to be determined and governed in all respects, with reference to benefit and damages, as is provided in this article."

This statute gave the Board of Aldermen the power to vacate the street for travel, but their action in vacating the street for travel did not assume to abandon nor did it abandon the vested right in the city to the easement of maintaining the storm sewer in question. The mere vacating of the street for travel purposes did not operate to abandon the storm sewer or the easement held by the city to maintain and operate the same. It remained open and apparent to all, and has been continuously used as a public drain since the vacation of the street, all of which constitutes persuasive evidence that the city had no intention of abandoning its easement in the storm sewer. On the question of what does and what does not constitute abandonment of an easement Corpus Juris, Volume 19, page 941, Section 149, has this to say:

"A party entitled to a right of way or other mere easement in the land of another may abandon and extinguish such right by acts in pais and without deed or other instrument in writing. This he may do without responsibility of any sort and without consulting the grantor where the easement was created by grant. The fact that the easement is created by statute does not affect the operation of the rule. Ordinarily the question of abandonment is purely one of intention. The acts relied on as evidencing this

intent to abandon must be of an unequivocal and decisive character. Whether a party has abandoned his right to an easement is a question of fact for the determination of the jury, and is never a question of law for the court to determine. An abandonment is to be more readily presumed where the easement is granted for the public benefit than where it is held for private use, otherwise an inactive corporation might deprive the public of useful and beneficial improvements.

"Abandonment of part of a right of way, the remainder of the right of way being still used as contemplated in the grant creating the right, will not extinguish, the entire right of way, but only so much of it as has been abandoned."

Hence, it may well be held that the vacation of the street for travel purposes by the city did not operate to abandon its easement in the ground formerly constituting the public street for storm sewer purposes.

All persons who participated in the construction of the storm sewer in question in said First Street and all persons who may have acquired abutting property from them, or who claim under them, with notice of the storm sewer are now estopped to deny the right of the city to continue to maintain the same on that part of the abutting lots which formerly constituted part of the street after the street was vacated. The doctrine of equitable estoppel or estoppel in pais applies to the case. The matter of the construction of the improvement was taken up with the property owners served by the sewer and discussed with them, and they agreed to participate and did participate in making the improvement by dividing the cost thereof with the city. Thereupon, in 1922 the city constructed the storm sewer in the street. They stood by all these years-- more than ten years-- prior to the vacating of the street in 1938, and until the city had acquired a vested right in the land by prescriptive use as a public easement, and for a period of six years after the vacating of the street in 1938 without protest. Having thus participated in making the improvements and having acquiesced in its location and maintenance by the city they are estopped to claim now that the city lost its easement in the ground for storm sewer purposes by vacating the street for travel. On this proposition Corpus Juris, Volume 21, pages 1160, 1161, 1162, Section 163 says:

"One who with knowledge of the facts and without objection suffers another to make improvements or expenditures on, or in connection with, his property, or in derogation of his rights under a claim of title or right, will be estopped to deny such title or right to the prejudice of that other who has acted in reliance on and been misled by his conduct; and a fortiori is applicable where the party against whom the estoppel is claimed not only makes no objection but assists in making the improvements. The estoppel may arise, even though the period of acquiescence is very short. * * * * *

This question has often been before our Supreme Court. In the case of *Dodd v. The St. Louis & Hannibal Railway Company*, 108 Mo. 581, Lc. 585 the Court held:

"The verdict was for the defendant, and it is now assigned for error that the court misdirected the jury by telling them that, if plaintiff and those from whom he derived title acquiesced in the building of the railroad on said land, he could not recover.

"It is well settled in Missouri that ejectment will lie where a railway company builds its road over land to which it has acquired no requisite title by condemnation or conveyance or license, express or implied. * * * *

"And it is equally well settled that a party, who, with full knowledge, stands by and permits a company to expend large sums of money in the construction of a railroad through his land without objection, forfeits his right of ejectment. * * * This right is forfeited by virtue of the application of the doctrine of estoppel as well as the intervention of public interests. * * * * *

In the case of *Collins v. Rogers*, 63, Mo. 515, l.c. 516, our Supreme Court on this question, said:

"We think the proof ample to show that a mistake was made in the conveyance executed by plaintiff to his brother, James H. Collins. In addition to that, plaintiff acted as the agent of his brother in effecting the trade with Barlow, sent the deed on to Illinois to his brother to have it executed, and represented that his brother had the title,

and afterwards delivered the deed obtained from his brother, and received the money for the land. Moreover, plaintiff stood silently by for years, while defendant, in good faith, has made valuable and lasting improvements on the disputed premises.

"Taking into consideration all the foregoing circumstances, we feel no hesitancy in affirming the judgment of the trial court."

In the case of *Miller & Lux v. Land Company*, 99 Pac. 179, a California case, the plaintiff, a corporation, and the defendant, a land company, had agreed that plaintiff should construct a canal and canal gate leading from a reservoir of water controlled by defendant to lands of plaintiff. Plaintiff constructed the canal and gate and was invited and encouraged to do so by the defendant, and defendant saw the work going on until the same was finished, and saw plaintiff using the canal and gate to convey water to plaintiff's land for several years. Defendant built a dam across the canal which destroyed plaintiff's use thereof. Plaintiff sued and had judgment in the lower court. Defendant appealed. The Supreme Court of California, p. 180 in affirming the case, said:

"From another point of view the complaint is equally impregnable against attack upon demurrer. The allegations above quoted, with others which the complaint contains, may be treated, and they are sufficient when so treated, as a pleading of estoppel in pais. The findings in support of these allegations establish that the defendant, knowing the purpose and nature of the work about to be done by plaintiff's grantor, assented to, aided and encouraged him in, the performance of this work, upon which was expended a considerable sum of money. Here are clearly present all facts necessary to establish such an estoppel. And thus, by this estoppel, defendant is forbidden to deny the granting of the parcel license. The evidence is sufficient to support these findings."

The case of *Klowlatskowski v. Duluth Superior Dredging Co.* 167 N. W. 970 (Mich.) was a case where the defendant, Dredging Co., deposited materials such as sand, silt, and gravel dredged from a river on the lands of plaintiff to his damage as he claimed. He sued and had judgment in the lower court. On appeal, the Supreme Court of Michigan in reversing the case,

1.c. 972 (2d) said:

"It was the contention of defendant at the trial and the testimony tended to support it that Mr. Linton, as trustee for the Saginaw board of trade, attempted to secure from plaintiff the right of way across his land for the boulevard; that plaintiff refused to sell, but suggested a trade or exchange might be made for other land in the vicinity; that plaintiff did, however, give Mr. Linton permission to make the deposit on his land, and the inference from the testimony is that the question of trade or exchange would be taken up later; that plaintiff was there every day while the forms were being constructed on his land to hold the dredged materials in place; and that plaintiff gave some assistance in that work, and that he entered no protest during the time, and neither did he object during the seven days the dredging was being done. Under these circumstances, defendant claims that it had the right to take the judgment of the jury as to whether plaintiff acquiesced in the work while it was going forward, and that they should have been instructed that if he did so acquiesce he could not now be heard to say that defendant was guilty of a trespass.

"It is nearly always difficult to say whether the doctrine of equitable estoppel should be applied to a given state of facts. It appears to me, however, in the case under consideration that if the jury were impressed with the foregoing testimony they would be justified in finding that plaintiff so far acquiesced in the work as to preclude him from claiming that defendant was guilty of a trespass in making the deposit on his land. But it is urged that mere silence will not preclude him. This undoubtedly is true, but if defendant's testimony is to be believed, there was something more than mere silence. The plaintiff not only refrained from making any objection, but assisted in erecting some of the forms. He admitted, upon cross-examination, that he saw the forms on the Tyler place immediately north of him, and saw the dredged materials go into them before the work was undertaken on his premises. He made no protest then, nor did he protest while the operations were going on on his premises. Not only by his silence, but by his act, did he give credence to the talk which defendant understood that he had

had with Mr. Linton. I am of the opinion that these facts call for the application of the doctrine of estoppel in pais, and this view is supported by the recent opinion of Mr. Justice Kuhn, in Morrison v. Electric Light, etc., Co., 181 Mich, 624, 148 N. W. 354. * * * * The failure to give this request was prejudicial error."

It must, therefore, be held that the property owners who participated in the construction of the storm sewer in question, by paying a part of the cost thereof, and those who acquiesced in its use and maintenance by the city thereafter, as well as all purchasers who may have acquired any of such land with either actual or constructive notice of the use of the same for a storm sewer easement by the city are estopped to deny the city's right now to the easement. What constitutes notice and sufficient notice in such cases is contained in the text of 19 Corpus Juris, Sections 145 and 146, pages 939 and 940:

"One who purchases land with notice, actual or constructive, that it is burdened with an existing easement takes the estate subject to the easement, and will be restrained from doing any acts which will interfere with the benefit and enjoyment of the easement to the full extent to which the party having a right thereto, who has not parted with or impaired the same, was entitled at the time when such purchaser bought. He has no greater right than his grantor to prevent or obstruct the use of the easement. The rule applies whether the sale is voluntary or involuntary. Frequent applications of the rule are found in the case of private rights of way, stairways, and water rights.

"Notice of an easement may be imputed to the purchaser by a properly recorded instrument in which the easement is granted. And where the use of the easement is open and visible, the purchaser of the servient tenement will also be charged with notice, and that too although the easement was created by a grant which was never recorded. Nevertheless the purchaser of property may assume that no easements are attached to the property purchased which are not of record except those which are open and visible, and he cannot otherwise be bound with notice. There should be such a connection between the use and the thing as to suggest to the purchaser that the one estate is servient to the other."

CONCLUSION

Considering the facts stated in the request for an opinion herein, and applying the text law and decisions of the courts, in the authorities and cases cited and quoted, to such facts and conditions involved, it is the opinion of this department that the City of Thayer had a vested right as a perpetual easement in the ground formerly constituting First Street in said city to use the same for storm sewer purposes, notwithstanding said street was vacated in 1939, and that said city can not be compelled by any abutting property owners to remove said storm sewer or compel the discontinuance of any use thereof as an easement in the ground formerly used as a part of said First Street.

Respectfully submitted,

GEORGE W. CROWLEY,
Assistant Attorney General

APPROVED:

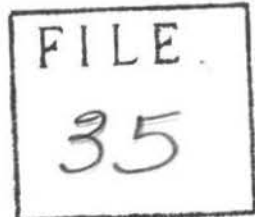
ROY McKITTRICK
Attorney General

GWC:MEB

CITY AND AIRPORTS: West Plains may lease an airport under Section 15122, Revised Statutes 1939.

October 10, 1944

Honorable H. J. Griffin
Attorney at Law
West Plains, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion under date of October 5, 1944, which request reads as follows:

"Will you please give me your opinion on Section 15125 of Session Acts of 1943, with the following questions involved therein:

"The City of West Plains through its proper officers desires to enter into an easement, lease or use under said section for airport purposes. The City has in mind an easement, lease or use for the term of ten years, paying therefor the sum of one thousand dollars (\$1,000.00) per year, with an option to purchase at any time during said term at a stipulated sum. There is no question involved as to the required funds.

"Could the City legally execute this easement, lease or use under said Section 15125 of 1943 Session Acts under the above circumstances?

"This is a very important matter to the parties interested and all parties concerned are anxious to know about this at your earliest convenience. The owner of the real estate is insisting that this be settled at once. The City Council is very anxious to take this question up at its next regular meeting to be held Tuesday evening, October 10th. This is the subject the writer called your office about this afternoon."

You state there is no question involved as to the required funds, so we are assuming that the raising of money for this proposed lease will not violate any limitations prescribed in the statutes or constitution of this State.

Section 15125, Laws of 1943, page 326, repealed this same section of the Revised Statutes 1939, and authorized any city to not only acquire, by purchase, property for an airport or landing field, or an addition thereto, but if necessary the city may now condemn such property and further prescribe the manner of such procedure.

Section 15125, Laws of 1943, further defines property, which was not defined in the Revised Statutes 1939. Property is now defined as any real and personal property whether publicly or privately owned, or any easement or use therein. Section 15125, Laws of 1943, further granted the additional authority to purchase or condemn publicly owned property. In defining property, by using the words "easement or use therein," we think the Legislature intended to include electric lines, telephone lines, water mains, roads, etc. Section 15125, Laws of 1943, page 326, is as follows:

"Any county, city or city under special charter shall have the power to acquire by purchase, property for an airport or landing field or addition thereto, and if unable to agree with the owners on the terms thereof, may acquire such property by condemnation in the manner provided by law under which such county or city is authorized to acquire real property for public purposes, or if there be no such law, then in the same manner as is now provided by law for the condemnation of property by any railroad corporation.

"The term 'property' as used in this section shall mean and include any real and personal property whether privately or publicly owned or any easement or use therein, including, but not by way of limitation, property owned by school districts, water districts, fire districts, road districts, sewer districts, drainage districts, levee districts, railroads, and property both real and personal owned by any other corporation and shall include churches, graveyards, graveyard associations, parks, private roads, bridges, culverts, pipe lines, water lines, water reservoirs or storage tanks, canals, ditches, and levees, railroads or other rights of way, streetcar or traction lines and tracks,

telegraph, telephone and power lines, poles and conduits and including state roads or roads under the jurisdiction of the State Highway Commission. The purchase price or the award of compensation or damages for the taking of any real or personal property or any easement or use therein acquired for an airport or a landing field or any addition thereto may be paid for wholly or in part from the proceeds of the sale of bonds of such county, city or city under special charter as the Governmental or legislative body of such county, city or city under special charter shall determine, subject, however, to the adoption of a proposition therefor at any election to be held in such county, city or city under special charter for such purpose; also to permit said municipality or municipalities mentioned in this section to issue revenue bonds for said above mentioned purpose on authority of the governing body of said municipality; Provided, that no airport or landing field shall be established or located in any county, city or city under special charter in violation of any plan or master airport plan or zoning regulation restricting the location of an airport or landing field adopted by the planning commission of any such county, city or city under special charter."

When a city only contemplates leasing an airport, such authority to lease airports or landing fields is derived from Section 15122, Revised Statutes 1939, which reads as follows:

"The local legislative body of any city, including cities under special charter, village or town in this state is hereby authorized to acquire, by purchase or gift, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate, in whole or in part, alone or jointly or concurrently with others, airports or landing fields for the use of airplanes and other aircraft either within or without the limits of such cities, villages, or town, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such city, village, or town."

It is a well established principle of law that where a statute is plain and unambiguous there is no room for construction, and technical rules for interpretation should be rejected.

October 10, 1944

In State v. Shain, 106 S.W. (2d) 898, l.c. 899, 900, the court said:

" * * * The cardinal rule to be followed in the construction of statutes is to arrive at the legislative intent. 'Rules for the interpretation of statutes are only intended to aid in ascertaining the legislative intent, "and not for the purpose of controlling the intention or of confining the operation of the statute within narrower limits than was intended by the lawmaker.'" Sutherland on Statutory Const., Sec. 279. If the intention is clearly expressed, and the language used is without ambiguity, all technical rules of interpretation should be rejected."

Therefore, it is the opinion of this department that Section 15125, Laws of Missouri 1943, merely gives cities additional authority for obtaining airports, landing fields, easements and uses; that it did not in any manner repeal Section 15122, Revised Statutes 1939; that under Section 15122, Revised Statutes 1939, any city is specifically authorized to lease airports or landing fields. Therefore, in view of Section 15122, supra, it is the opinion of this department that the city of West Plains may lease an airport as proposed in your request.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

VANE C. THURLO
Acting Attorney General

ARH:ml

COUNTY COURTS : County Court should not pay for
REGISTRARS : supplies for the Registrar of
: Vital Statistics.
:
:

January 19, 1944

Honorable Leo J. Harned
Prosecuting Attorney, Pettis County
Sedalia, Missouri



Dear Sir:

We have your opinion request of January 17, 1944, which reads as follows:

"Will you please inform me whether or not the County Court of Pettis County should furnish supplies, particularly stamps and stationery, to the Registrar of Vital Statistics of Pettis County?"

The statute providing for fees for local registrars is section 9780, R. S. Missouri, 1939. It is in part as follows:

"Each local registrar shall be entitled to be paid the sum of twenty-five cents for each birth and death certificate properly and completely made out and registered with him, and correctly copied and duly returned by him to the state registrar, as required by this article, and in case no births or deaths were registered during any month, the local registrar shall be entitled to be paid the sum of twenty-five cents for each report made to that effect, promptly made in accordance with this article. The amounts of money due and payable to the registrars under the provisions of this section shall be certified to the county courts, which courts shall pay the same by warrant drawn upon the county treasurer and payable out of the contingent fund of the county.* * *"

The statute providing for the office is

section 9763, R. S. Mo. 1939, which in part reads as follows:

"Within ninety days after the taking effect of this article, or as soon thereafter as possible, the state board of health shall appoint a local registrar of vital statistics for each registration district in the state. The term of office of local registrars, appointed by said board, shall be for four years, beginning with the first day of January of the year in which this article shall take effect, and their successors shall be appointed at least ten days before the expiration of their terms of office; * * *

Provided, that all sub-registrars shall be subject to the supervision and control of the state registrar, and may be by him removed for neglect or failure to perform their duties in accordance with the provisions of this article or the rules and regulations of the state registrar, and they shall be liable to the same penalties for neglect of duties as the local registrar; * * * (Underscoring ours.)

A registrar was expecially held to be a state officer in the case of State ex inf. McKittrick v. Langston, 84 S. W. (2d) 131, 1.c. 132, in the following words:

"There is no showing that John W. Williams has ever qualified as local registrar of vital statistics for the registration district above mentioned. Under the provisions of Article 2 of chapter 52 of the Revised Statutes of Missouri, 1929, (section 9040 et seq.(Mo. St. Ann. Sec. 9040 et seq. p. 4186 et seq.), which provide for the appointment of local registrars of vital statistics, it is clear that such officials are appointive state officers. State ex rel. V. Bus, 135 Mo. 325, loc. Cit. 333, 36 S. W. 636, 33 L. R. A. 616; State ex inf. v. Fasse, 189

Mo. 532, 88 S. W. 1; State ex rel. v. Caldwell, 310 Mo. 397, 276 S. W. 631; State ex inf. V. Allen, 316 Mo. 754, 755, 291 S. W. 454. As John W. Williams was appointed to an office 'under the authority of this state,' it became constitutional prerequisite to his entering upon the duties of his office that he comply with the requirements of section 6 of article 14 of the Constitution of Missouri which ordains that 'all officers, both civil and military, under the authority of this state, shall, before entering on the duties of their respective offices, take and subscribe an oath, or affirmation, to support the Constitution of the United States and of this state, and to demean themselves faithfully in office.' * * * (Underscoring ours.)

Section 9760, R. S. Mo., 1939, sets out the duties of the state board of health relative to vital statistics and provides as follows:

"It shall be the duty of the state board of health to have charge of the state system of registration of births and deaths; to prepare the necessary methods, forms and blanks for obtaining and preserving such records, and to insure the faithful registration of the same in the registration district and in the central bureau of vital statistics at the capital of the state. The said board shall be charged with the uniform and thorough enforcement of the law throughout the state, and shall from time to time promulgate any additional forms and amendments that may be necessary for this purpose."

In the case of Smith v. Pettis County, 345 Mo., 839 1. c. 844, wherein the question of the right of a public official to compensation was discussed, the court said:

"The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against

Hon. Leo J. Harned

-4-

Jan. 19. 1944

the officer. (Nodaway County v. Kidder, 344 Mo. 795, 129 S. W. (2d) 857; Ward v. Christian County, 341 Mo. 1115, 111 S. W. (2d) 182.) * * *

CONCLUSION.

In view of the Court's decision in the case of Smith v. Pettis County, supra. it is the opinion of this office that the County Court of Pettis County should only be charged with the fee provided for in section 9780, R. S. Mo. 1939, and that as to the furnishing of supplies, stationery, postage andc., the State Board of Health is specifically charged with that duty under section 9760; R. S. Missouri, 1939.

Respectfully submitted

GAYLORD WILKINS
Assistant Attorney General

APPROVED:

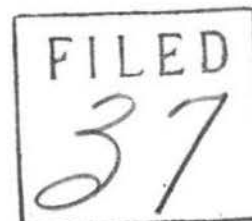
ROY MCKITTRICK
Attorney General

GW:LeC

HABITUAL CRIMINAL ACT: For prosecution under Habitual Criminal Act it is only required that previous crime be punishable by imprisonment in the penitentiary.

February 8, 1944

Hon. Leo J. Harned
Prosecuting Attorney
Pettis County
Sedalia, Missouri



Dear Sir:

This is to acknowledge receipt of your letter in which you request the opinion of this department on two questions therein submitted. Your letter is as follows:

"Section 4854, R. S. 1939, provides that if a subsequent offense with which a defendant is charged be such that upon a first conviction defendant would be punished by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense.

"My problem upon which I would like to have your opinion is whether or not such statutory provision applies to offenses such as a violation of the motor vehicle act, which may be punished by a maximum of twenty-five years in the penitentiary but yet grades down to a fine and jail sentence.

"In State v. English, 274 S. W. 474, 1.c. the Supreme Court said: 'The section under which the defendant was charged provides that if one has been convicted and has served a term in the penitentiary his punishment for the second offense shall be the longest term prescribed for such con-

viction as if it were the first offense. You will note that the statute quoted refers to a punishment 'by imprisonment for a limited term of years'. If the defendant were charged, we will say, with grand larceny which has a punishment of from two to five years in the penitentiary, then, of course, the punishment would be five years in the penitentiary, but I am not sure whether the provision of the statute apply to a case as above mentioned, such as stealing a motor vehicle, where the punishment grades down from a term in the penitentiary to a fine and jail sentence. It is on this point I would appreciate your opinion and ruling. There are, of course, some decisions which seem to indicate that even in a case like the one mentioned for motor car theft, that under this habitual criminal act, the punishment shall be the maximum provided, in the penitentiary, but it does seem that that holding and the holding set out in State v. English is not in accordance with the express provisions of the statute.

"Another thing that I would like to have your opinion upon, is this: Does the Section 4854 apply in the case where the defendant was convicted of an offense punishable by imprisonment in the penitentiary and yet the defendant was never incarcerated in the penitentiary or even the jail, but assessed a fine and complied with that sentence, namely, paid a fine and costs. Of course, under State v. Marshall, 34 S. W. (2d) 29, the Supreme Court has held that the Section 4854 applies to offenses punishable by imprisonment in the penitentiary, although the defendant was actually imprisoned in a work house.

"It would seem that the same reasoning would apply where the defendant was convicted, say for felonious assault, under Section 4409, which carries punishment by imprisonment in the penitentiary not exceeding five years or in jail or a fine.

"I would appreciate your writing me relative to the above."

We restate your questions as we understand them.

First. May a person be charged under the Habitual Criminal Act, Section 4854, R. S. Mo. 1939, where the first offense for which he was convicted is a graded felony. For example, a prosecution under the Motor Vehicle Act, where the maximum penalty is twenty-five years and the punishment and the penalties run down to a fine and jail sentence.

Second. You desire to know whether there may be a prosecution under the Habitual Criminal Act, Section 4854, supra, where the defendant has been convicted of an offense and only paid a fine and was not incarcerated in a jail or penitentiary, although the offense was punishable by imprisonment in the penitentiary.

We think your first question may be answered by what was said by the Supreme Court in State v. Marshall, 326 Mo. 1141, 34 S. W. 29, 1. c. 31:

"While it is alleged in the information that the defendant was punished, for his previous offense of stealing a motor vehicle, by imprisonment in the city workhouse of the city of St. Louis, said offense was 'punishable by imprisonment in the penitentiary,' and therefore the allegations of the information are clearly sufficient to invoke the provisions of section 3702. Had the framers of this section intended that it should apply only to persons who have been punished, for a previous offense, by imprisonment in the penitentiary, undoubtedly they would have said so. They did say, in plain and unmistakable language, that it should apply 'to any person convicted of any offense punishable by imprisonment in the penitentiary,' and it cannot be construed otherwise. * * * * *

The gist of the quotation from the above case is that all that is necessary is that the offense be punishable by imprisonment in the penitentiary and not that he was punished by imprisonment in the penitentiary. The liability to a punishment in the penitentiary is all that the statute requires. What was said by the court in State v. English, 274 S. W. 470,

was criticized in the Marshall case, supra, and the court did not follow said case, saying that what was said in the English case was obiter dictum.

Replying then, to your second question we would say that it is not necessary that the defendant be actually incarcerated in a jail or penitentiary, in order to be prosecuted under the Habitual Criminal Act. It is necessary, however, that it be alleged and proven in a prosecution under the Habitual Criminal Act that he has been convicted of a crime punishable by imprisonment in the penitentiary, and not what he actually received by way of punishment.

It will be observed, upon a reading of Section 4854, supra, that said section provides that "the person convicted * * * shall be discharged, either upon pardon or upon compliance with the sentence," of a crime punishable by imprisonment in the penitentiary.

CONCLUSION

It is our opinion that a person may be prosecuted under the Habitual Criminal Act if he has previously been convicted and shall have been discharged, either upon pardon or upon compliance with the sentence although the penalties under the prior conviction scale down to a fine or jail sentence, if the offense is punishable by imprisonment in the penitentiary.

And, further, it is our opinion that it is not essential that the defendant be actually incarcerated in a jail or penitentiary to be subject to the provisions of the Habitual Criminal Act. However, he must be convicted of a crime punishable by imprisonment in the penitentiary.

Respectfully submitted,

APPROVED:

COVELL R. HEWITT
Assistant Attorney-General

ROY MCKITTRICK
Attorney-General

CRH:CP

TAXATION: Deed under Jones-Munger law conveys fee simple title,
subject only to certain taxes.

October 21, 1944



Mr. H. H. Harris, Jr.,
City Attorney
Marshall, Missouri

Dear Sir:

We have your letter of the 14th in which you
submit the following for our opinion:

"Our City Collector has advertised
for sale a piece of property here
in town to be sold for delinquent
taxes under the Jones-Munger law in
November.

"There is a life estate in the
property with remainder in fee over
to several parties, some of whom are
living at unknown addresses. The
collector has been asked several
times as to whether or not the
purchaser at the sale gets a certifi-
cate which in two years will entitle
him to a deed for the life estate or
to the fee. He asked me about the
matter and I do not seem to find the
answer under the new law. Under the
old law (134 S.W. 2nd 62, and other
cases) if the life tenant and the
remaindermen were made defendants
in the suit then a fee was given.
But under the new law notice is given
just as to the description of the
tract of land, sale is had, certifi-
cate issued and thereafter a deed by
the collector; and then comes the

Oct. 21, 1944

suit to quiet title under section 11169. Nothing is mentioned in that section as to a fee simple title and the section 11150, states that the conveyance shall be 'prima facie evidence of a good and valid title in fee simple in the grantee,' but the conveyance itself reads to me like a quit-claim deed. And I find no cases on this point."

We believe Section 11149, R. S. Mo. 1939, answers your question. That section provides in part as follows:

"If no person shall redeem the lands sold for taxes within two years from the sale, at the expiration thereof, and on production of certificate of purchase, and in case the certificate covers only a part of a tract or lot of land, then accompanied with a survey or description of such part, made by the county surveyor, the collector of the county in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, in the name of the state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple, subject, however to all claims thereon for unpaid taxes except such unpaid taxes existing at time of the purchase of said lands and the lien for which taxes was inferior to the lien for taxes for which said tract or lot of land was sold. * * * * *

Section 11150, R. S. Mo. 1939, provides that such deed by the collector shall be prima facie evidence of a good and valid title in fee simple in the grantee of said deed. Our Supreme Court in the case of Johnson v. McAboy, 169 S. W. (2d) 932, 934, held that a purchaser at such a tax sale could make out a prima facie case in court by the production of a

tax deed from the collector. The form of deed set out in Section 11150, supra, is a form similar to that used in a warranty deed. However, there would be no way to enforce a warranty against the collector, so that the deed, in effect, is a quit claim deed. Nevertheless, a fee simple title is conveyed as is often done by a quit claim deed. Section 11149, supra, provides that the deed shall convey a fee simple title, and the form of the deed set out in Section 11150 is sufficient to convey such title.

It is true that under the old law where the lien for taxes was enforced by a suit in court, followed by an execution sale, the judgment establishing the lien was good only against those joined in the suit. This was done so that no one would be deprived of his property without due process of law. However, under the present provisions for sale of lands for delinquent taxes, everyone having an interest in the lands has an opportunity to protect his interest. By Section 11145, R. S. Mo. 1939, any person having an interest in the land may redeem the same during the period of two years following the sale. Everyone is presumed to know that taxes are assessed against land, and therefore when provision is made allowing persons interested in real estate several years' time after the taxes become delinquent within which to pay them, such persons are given ample opportunity to protect their interest in the property.

Conclusion

It is, therefore, the opinion of this office that a sale of real estate under the so-called Jones-Munger law conveys a fee simple title in said land, subject to unpaid taxes except such unpaid taxes existing at time of the purchase of said lands and the lien for which taxes was inferior to the lien for taxes for which said tract or lot of land was sold.

Respectfully submitted,

APPROVED:

HARRY H. KAY
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

HHK:EG

PROSECUTING ATTORNEYS: : Under Sections-4876 and 4878
: R. S. Mo. 1939, must investi-
: gate as well as prosecute
: violators of liquor control
: act. A sound discretion must
: be used to determine extent
: of investigation.
:
:

November 24, 1944

Honorable Leo J. Harned
Prosecuting Attorney
Pettis County
Sedalia, Missouri

11/30
FILE
37

Dear Mr. Harned:

This will acknowledge your letter of August 23, 1944, which is as follows:

"Will you please inform me, under Section 4876 R. S. Mo., 1939, whether or not it is the duty of the prosecuting attorney to go to the various places where liquors are sold and / or drunk, and gather evidence as to law violations, and then to prosecute the case?

"As I understand it, the Supreme Court has criticized the prosecuting attorney for prosecuting a case and appearing as a witness in the same case.

"I would appreciate your opinion as to whose duty it is to collect the evidence and present it to the prosecuting attorney, if it is not the duty of the prosecuting attorney.

"I would appreciate this at your earliest convenience."

Section 4876 R. S. Mo., 1939, provides:

"For the purpose of enforcing the provisions of this act and acts amendatory thereto, the prosecuting attorneys of the respective counties and the circuit attorneys, or at the request of the governor, the attorney general shall investigate and prosecute all violations of any provision of this act; and shall represent the supervisor of liquor control in any and

all legal matters arising under this act. When requested by the governor, the attorney general, or his assistants, shall in the enforcement of this act, have the power to sign indictments or informations and conduct prosecutions in any county or city within this state. Whenever any tax, fee or other charge, as authorized by this act, shall be due, suit may be instituted in any court of competent jurisdiction by the prosecuting attorney of the county, or at the request of the supervisor of liquor control, by the attorney general, in the name of the state at the relation of the supervisor of liquor control, to recover such tax, fee or other charge, and in any such suit all persons, associations or corporations interested may be made parties and service may be had on both residents and nonresidents in the same manner as provided by law in civil actions. The fees and expenses of the attorney general in performing the duties as required under this section shall be paid out of the appropriation of the supervisor of liquor control."

It must be noted that the section declares that the prosecuting attorney shall investigate and prosecute all violations of any provisions of this act.

Section 4878 R. S. Mo., 1939, provides:

"The supervisor of liquor control shall, at least once each month, transmit a list of all complaints made to or by him against licensees for alleged violations of the liquor control act to the circuit and prosecuting attorney of the city of St. Louis and to the prosecuting attorney of every county in which said violations are alleged to have occurred, together with a list showing all revocations and suspensions of licenses within such county ordered by said supervisor of liquor control, together with a brief statement of the facts pertaining to each case, and it shall be the duty of the supervisor of liquor control at the time of transmitting each such list and statement to transmit to the attorney general a duplicate thereof for the information of the attorney general in carrying out and enforcing the provisions of the liquor control act. It shall be the duty of the circuit

and prosecuting attorney of the city of St. Louis and the prosecuting attorney of every county to transmit to the supervisor of liquor control, at least once in every three months, a written report of the action, if any, taken by such circuit or prosecuting attorney on each complaint contained on the lists so transmitted to him. "

In State on Inf. McKittrick v. Wymore, 132 S. W. (2d) 979, the court states:

"Under the rule, if it is the statutory duty of a prosecuting attorney to commence and prosecute criminal actions, by necessary implications, he should qualify himself to determine, in the exercise of an honest discretion, if a prosecution should be commenced. The only way he can determine the question is to make an investigation of the facts and applicable law. If he determines there should be a prosecution, and determines, in the exercise of an honest discretion, that he should proceed by information, also by necessary implication it is his duty to do whatever is necessary under the law, to authorize the filing of the information. In making an investigation he qualifies himself to make and swear to the information. **** It is well known that private persons rarely file complaints. They may subject themselves to costs and the hazard of an action for malicious prosecution. If a private person files a complaint, the prosecuting attorney is not compelled for that reason to file an information. However, it is his duty to make a reasonable investigation and then determine if an information should be filed.

In State on Inf. of McKittrick v. Graves, 144 S. W. (2d) 91, l.c. 98 the court states:

"But where the crime is one against the body politic generally and not against a particular individual as in the case with the laws in reference to gambling, intoxicating liquor, elections etc. experience teaches that a

private prosecuting witness will rarely come forward to initiate proceedings. * * * It is not only the right but the duty of the prosecutor in such cases to himself take the initiative. * * * Respondent says that he had no facilities for making investigations in these matters. It is in evidence that in prior years respondent had an investigator attached to his office force, and that while he had no such investigator during 1938 and the early part of 1939, he later obtained one. It is not shown that he made any effort to gain such an assistant during the period here involved. In any event, he had the power to appear before grand juries and he had the power to apply for the issuance of search warrants. It may be that any effort on his part to correct the conditions mentioned would have been hedged around by difficulties. But this could not excuse a failure to make any attempt at investigation. "

In State on inf. McKittrick v. Wallach, 182 S. W. (2d) 313, it is stated:

"The duty of a prosecuting officer necessarily requires that he investigate i.e., inquire into the matter with care and accuracy, that in each case he examine the available evidence, the law and the facts and the applicability of each to the other, that his duties further require that he intelligently weigh the chances of successful termination of the prosecution, having always in mind the relative importance to the county he serves of the different prosecutions which he might initiate. Such duties of necessity involve a good faith, exercise of the sound discretion of the prosecuting attorney. * * * Such discretion exercised in good faith authorizes the prosecuting officer to personally determine, in conference and in collaboration with peace officers and liquor enforcement officers that a certain plan of action or a certain policy of enforcement will be best productive of law enforcement and will best result in general law observance."

It is therefore clearly seen that the prosecuting attorney has the duty to make investigations as far as liquor violations are concerned. He also has

the duty to initiate proceedings against offenders. The extent to which the prosecuting attorney should personally take part in these investigations is a matter for the use of his sound discretion under the particular circumstances involved. Under ordinary conditions the peace officers of his county, together with the agents of the liquor department will be able to procure the evidence and do the testifying. His own, as well as their investigations will also probably find private citizens who have evidence and will testify. The extent to which he must personally assume the initiative would seem to depend on the particular situation in his county. If the violations are being discovered by the peace officers and liquor agents he should cooperate with them and file information and diligently attempt to procure convictions of violators. However, if the enforcement officers are lax he should feel a personal responsibility in stirring them to do their duty, and should not hesitate to make personal investigations to discover violations.

It is true that the law frowns on a prosecutor's testifying in a case he is prosecuting, even though it may not constitute reversible error for him to do so. The Springfield Court of Appeals in *State v. Nicholson*, 7 S.W. (2d) 375, stated that the prosecuting attorney should not accompany the sheriff when serving a search warrant in the absence of peculiar circumstances making it necessary. The court held that it was not error for the court to permit the prosecuting attorney to testify, but that it to a certain extent showed a personal interest on his part and also held that if the case was retried the prosecuting attorney should be disqualified and a special prosecutor appointed. However, there were other facts besides the mere testimony of the prosecutor which showed his personal interest in the case. It might well be that under other circumstances the testimony of the prosecutor would not have been prejudiced.

However, in most instances his investigation will discover witnesses who can testify to the violations. The requirement that the prosecutor investigate does not mean that he should take the place of the liquor agents or the peace officers, but it does mean that he should use a sound discretion to enforce the liquor laws in his county and that he cooperate in every way possible with the liquor agents and peace officers and that he should feel a personal responsibility to see that violations are discovered.

Mr. Leo J. Harned

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Nov. 24, 1944

He should carefully study the reports which Sec. 4878 R. S. Mo., 1939, requires the Supervisor of Liquor Control to transmit to him. He should see to it that all complaints so transmitted are investigated and where the reports show a suspension or revocation because of a violation of the liquor laws he should see to it that prosecutions are instituted, where sufficient evidence is available to indicate that a conviction can be obtained.

CONCLUSION.

Under Secs. 4876 and 4878, R. S. Mo., 1939, prosecuting attorneys have a duty to investigate and prosecute all violations of the Liquor Control Act. The extent of their investigation is a matter for the use of their discretion but an arbitrary refusal to investigate or a lack of initiative is not excusable.

Respectfully submitted

ROBERT J. FLANAGAN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

RJF:LeC

CONVEYANCE: Maker of a note secured by a deed of trust cannot release record after payment of such note.

May 10, 1944



Mr. Joseph Hayes
Recorder of Deeds
Butler County
Poplar Bluff, Mo.

Dear Mr. Hayes:

This is an acknowledgment of your inquiry addressed to the General on May 5, 1944, which is as follows:

"I am writing you for information concerning the releasing of Deeds of Trust and Mortgages on Real Estate. This office has for many years followed the custom of not allowing the maker of the note or notes to make his own release, (That is he has never been permitted to sign the record as the assignee of the beneficiary or note, regardless of the proper indorsement), whether this is the proper way or not, that is what we would like to know.

"Would it be correct for the maker of the note, after the note has been properly indorsed by the Beneficiary, to sign the marginal release, as Assignee of the Beneficiary?

"What we specifically want to know is, can the maker of the note make his own release.?"

Section 3465, R. S. Mo., 1939, is in part as follows:

"If any mortgagee, cestui que trust or assignee, or administrator of the mortgagee, cestui que trust or assignee, receive full satisfaction of any mortgage or deed of trust, he shall, at the request and cost of the person making the same, acknowledge satisfaction of the mortgage or deed of trust on the margin of the record thereof, or deliver to such person a sufficient deed of release of the mortgage or deed of trust; but it shall not in any case be necessary for the trustee to join in such acknowledgment of satisfaction or in such deed of release; and provided further,

that when any mortgage or deed of trust shall be satisfied by a deed of release, the recorder shall note on the margin of the record of such deed of trust the book and page where such deed of release is recorded. In case satisfaction be acknowledged by the payee or assignee, or in case a full deed of release is offered for record, the note or notes secured shall be produced and canceled in the presence of the recorder, who shall enter that fact on the margin of the record and attest the same with his official signature; and no full deed of release shall be admitted to record unless the note or notes are so produced and canceled, and that fact entered on the margin of the record and attested as above provided.* * *"

Section 3472 thereof is as follows:

"If any such person, thus receiving satisfaction, do not, within thirty days after request and tender of costs, acknowledge satisfaction on the margin of the record, or deliver to the person making satisfaction a sufficient deed of release, he shall forfeit to the party aggrieved ten per cent upon the amount of the mortgage or deed of trust money, absolutely, and any other damages he may be able to prove he has sustained, to be recovered in any court of competent jurisdiction."

The above sections indicate that any party legally holding a note secured by a deed of trust and who is legally entitled to receive the money due under such contract must, upon receiving satisfaction, acknowledge satisfaction on the margin of the record.

In passing on this question the Kansas City Court of Appeals, 181 Mo. App. 381, 385-6, said:

"The coupon notes were negotiable, and, when detached from the bond or note to which they pertained, they possessed all the attributes

of commercial paper. (8Am. & Eng. Ency. of Law (2nd Ed.), 6. Edwards v. Bates County, 163 U. S. 269, 1. c. 271.) And when negotiated they carried with them the security given by the deed of trust pro tanto. (8 Am. & Eng. Ency. of Law (2nd Ed.), 13.)

"The assignee of a note secured by a deed of trust is the party entitled to receive payment and who is thereupon bound to satisfy the record as to that note. (Sec. 2844, R. S. Mo. 1909; Ewing v. Shelton, 34 Mo. 518.) This applied as well to the assignee of a part of the notes secured as it does to the assignee of all. (Hill v. Wainwright, 83 Mo. App. 460.) Hence, after the coupons in this case were assigned to Boggs, he was the proper person to release as to them."

The payment of the debts secured by mortgages constitute satisfaction of such mortgages. In this connection the court in the case of McNair v. Picotte, 33 Mo. Reports 57, 71, held:

"Assuming, but not deciding, that the sheriff's sale to Duchouquette was void, the payment by Delassus of the debts secured by the mortgages was a satisfaction of the mortgages. The failure to enter satisfaction on the margin of the record of the mortgages might subject the mortgagees to penalties, but has no effect to keep the mortgages in existence. It was only a failure to supply convenient evidence of a fact accomplished.

"After the satisfaction of the mortgages, whatever right Delassus had was legal, not equitable, and this suit which prays only equitable relief, was properly decided against the plaintiffs, the representatives of Delassus.* * *"

Mr. Joseph Hayes

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May 10, 1944

CONCLUSION

Therefore, the assignee of a note or notes secured by a deed of trust, after payment to him of the full amount of such indebtedness, is the proper party to satisfy the record as to such note or notes. However, where there is a purported assignment of a note, after payment, to the maker thereof, such maker as assignee may not be permitted to satisfy the record.

Respectfully submitted,

SVM:EH

S. V. MEDLING
Assistant Attorney General

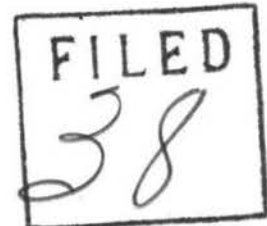
APPROVED:

ROY MCKITTRICK
Attorney General

MISSOURI STATE SCHOOL:

Accepting patients

May 20, 1944



Mr. J. M. Haw
Assistant Prosecuting Attorney
Charleston, Missouri.

Dear Mr. Haw:

Your letter of May 9th has been received. Your letter states:

"I have been requested to write you with reference to the possibility of compelling the Missouri State School for the Feeble-Minded at Marshall, Missouri, to accept patients sent it by the County Court.

"* * *The authorities here would like to have an opinion from you as to what can be done under these circumstances."

Article 6 of Chapter 51, R.S. Mo. 1939, consists of nine sections of our statutes dealing with the colony for feeble minded, epileptic or otherwise designated in the statutes as Missouri State School. These sections of said article dealing specifically with the subject of your inquiry as to the power to compel the managers of the Missouri State School to accept patients, must be read with other sections under Article 1 of Chapter 51, R.S. Mo. 1939, which comprises the general statutes governing state eleemosynary institutions. For instance, Section 9258, Article 1, Chapter 51 defines the state eleemosynary institutions and includes the Missouri State School at Marshall as one of the group. Section 9259 provides for a board of managers. Section 9263 gives the authority to the board of managers to make necessary rules, regulations and bylaws for the government, discipline and management of each institution not inconsistent with the laws of this state, and such rules shall be binding upon all officers of such institutions and shall remain in effect until changed by the board. Section 9278 provides for the appointment of a superintendent of each eleemosynary institution who shall have complete charge, control and management of the entire institution with special attention to the health and sanitation of the respective institutions over which he has been appointed as manager.

Section 9392, Article 6, Chapter 51, provides that there shall be received and gratuitously supported in the Missouri State Schools, feeble minded and epileptics residing in the state who, if of age, are unable, or if of age, whose parents or guardians are unable to provide for their support therein, and who shall be designated as state patients. This section then provides that such additional number of feeble minded and epileptics, whether of age or under age, as can be conveniently accommodated shall be received and the school by the managers on such terms as shall be just; and shall be designated as private patients. This section further provides that all patients, either state or private patients, shall be received upon the written request of the person desiring to send them. This section further provides for the procedure and proof necessary to be followed and supplied to determine that a patient is an eligible and proper candidate for admission to the colony.

Section 9393 and section 9394 relate to the transfer of dangerous patients to other institutions, the discharge or parole of patients from the Missouri State School. They do not bear upon the question here and will not be further noticed.

Section 9395 must be read along with Section 9392, since section 9395 treats solely of the admission of state patients and defines generally the procedure to be followed by the managers respecting the admission of state patients. Section 9395 is as follows:

"Apportionment of state patients. -- When-
ever applications are made at one time
for admission of more state patients
than can be properly accommodated in the
school, the managers shall so apportion
the number received that each county may
be represented in a ratio of its dependent,
feeble-minded and epileptic populations
as shown by statistics of this state."

The patients being divided into two groups or classes; that is, state patients and private patients, it is obvious that the intent of the legislature was to give priority to state patients. The language in Section 9392 definitely states in the first paragraph that dependent patients shall be designated as state patients. Then the second paragraph of Section 9392 provides that such additional number of feeble minded and epileptics whether of age or under age as can be conveniently accommodated shall be received and shall be

designated as private patients.

Section 9395, in providing that when applications are made at one time for more state patients than can be properly accommodated, the managers shall so apportion the number received that each county may be represented in a ratio of its dependent, feeble minded and epileptic population as shown by the statistics of this state manifestly confers discretionary powers upon such managers to determine: (1) Whether there are or not applications at any one time for admission of more patients than can properly be accommodated in the school; (2) They must determine what the apportionment of patients received should be so that each county may be represented in such proportions as its feeble minded and epileptics bears to the whole population of such unfortunates according to the statistics of this state.

The determination of these matters involves the exercise of the discretionary judgment of the managers as to facts upon which they must admit patients to the school. This would make the conclusion inevitable that unless the board of managers should grossly abuse their discretionary powers they cannot be compelled to receive patients as long as they based the refusal upon over crowded conditions which would bear upon sanitation, health and other elements of the safe and proper conduct of the institution.

Mandamus will not issue to compel the performance of a discretionary act of a public officer unless he has abused that discretion. 38 C.J. 592, 593, 594, Section 71.

59 C.J. 1077 lays down this rule:

"Generally, statutes, directing the mode of proceeding by public officers, designed to promote method, system, uniformity, and dispatch in such proceeding, will be regarded as directory if a disregard thereof will not injure the rights of parties, and the statute does not declare what result shall follow noncompliance therewith, nor contain negative words importing a prohibition of any other mode of proceeding than that prescribed."

In the case of *Hudgens et al. v. School District et al.* 312 Mo. 1, l.c. 9, our Supreme Court had this to say about mandatory or directory statutes:

May 20, 1944.

"Under a general classification, statutes are either mandatory or directory; a determination of their character in this respect is of first importance in their interpretation. If mandatory, in addition to requiring the doing of the things specified, they prescribe the result that will follow if they are not done; if directory, their terms are limited to what is required to be done. (State ex rel. McAllister v. Bird, 295 Mo. 344)".

These sections providing for the admission of patients to the Missouri State School merely direct what the board of managers shall do in their discretion with respect to determining how many can be accommodated in the school, consistent with health conditions and other conditions, and prescribe no result if they are not done. It would appear then that these statutes are directory and not mandatory.

Respectfully submitted

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

GWC.sc

SCHOOL : May sell school buildings if no-
DISTRICTS : longer required and new building
: is provided.

January 20, 1944



Mr. Frank L. Hodge
Superintendent of Schools, Maries County
Vienna, Missouri

Dear Mr. Hodge:

This will acknowledge the receipt of your letter of January 6, 1944, in which you request an opinion from this department. Omitting the caption and signature, the full text of your letter is as follows:

"About nine years ago, Crismon District #28 and Salem District # ?, were combined for school purposes. Since that time school has been held at Brinktown #56 in Maries County, Missouri. The school is under the control of a board of directors, but the school is held in a building belonging to the Catholic Church.

"The question is: Can the board of directors sell the two school houses which have been abandoned, and what procedure must be taken?

"Thanking you in advance for an early reply, I am,"

While not specifically stated in your letter, we are assuming for the purposes of this discussion that the consolidation mentioned was in strict compliance with Section 10487 R. S. Mo., 1939, and governed by Art. V of Chapter 72, of R. S. Mo., 1939. We deem it unnecessary to quote these sections and do no more than cite them for convenience.

Under the provisions of the statutes, title to property of the School District is held by the Directors. No school house or school site shall be abandoned or sold until another site or schoolhouse is provided for in such District. We refer to Section 10403, R. S. Mo. 1939, which in part reads:

"The title of all schoolhouse sites and other school property shall be vested in the district in which the same may be located; and all property leased or rented for school purposes shall be wholly under the control of the board of directors during such time; but no board shall lease or rent any building for school purposes while the district schoolhouse is unoccupied, and no schoolhouse or school site shall be abandoned or sold until another site and house are provided for such school district. R. S. 1929, Sec. 9269."

From your letter we conclude that by reason of the consolidation the two schools are no longer needed and adequate provision has already been made for pupils of the district. Having complied with that portion of the statute the Directors may dispose of the property no longer needed.

Section 10471, R. S. Missouri, 1939, reads in part as follows:

"When the demands of the district require more than one public school building therein, the board shall, as soon as sufficient funds have been provided therefor, establish an adequate number of primary or ward schools, corresponding in grade to those of other public school districts, and for this purpose the board shall divide the school district into school wards and fix the boundaries thereof, and the board shall select and procure a site in each newly formed ward and erect a suitable school building thereon and furnish the same; and the board may also establish schools of a higher grade, in which studies not enumerated in section 10627 may be pursued; * * *"

Under the provisions of the statutes the Board is authorized to proceed with the sale of school property, if said property is not now required by the district and provision for carrying on the educational program has been made.

The decisions in the state in cases involving sale of school property are consistent in holding that the Board in its discretion may discontinue to use any property owned by the district and sell same. Other decisions go further and say that the site of a school may be changed without a vote of taxpayers of the district. Sustaining this thought are:

Gladstone v. Gibson, 208 Mo. A., 70
283 S. W. 271
Corley v. Montgomery, 226 Mo. A., 795
46 S. W. (2d) 283.
Crow v. Consolidated Dist, No. 7, 36 S. W. (2d)
676.

Further examination of the statutes show that power is given the voters within the district to direct the sale of property no longer required for the use thereof. The portion of this section, useful for our purposes, reads as follows: Section 10419, R. S. Mo. 1939.

"The qualified voters assembled at the annual meeting, when not otherwise provided, shall have power by a majority of the votes cast: * * *

" To direct the sale of any property belonging to the district but no longer required for the use thereof, to determine the disposition of the same and the application of the proceeds. * * *"

C O N C L U S I O N .

From the above and foregoing, this department is of the opinion that the Board of Directors of a School District is authorized, under the statute, to sell property of the district, not now required by the dis-

Mr. Frank L. Hodge

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1-20-44

trict for school purposes. That the provision for carrying on the educational program of the district requires the board to arrange school accommodations for pupils of the district before sale of the property. That the sale may be made by the district board or the voters at the annual school election, may, by majority, vote direct that property no longer needed by the district be sold.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LIM:LeC

TAXATION:
TAX SALES:

Form of Trustee's Deed.

January 24, 1944



Honorable W. A. Holloway
Chief Clerk
State Auditor's Office
Jefferson City, Missouri

Dear Mr. Holloway:

Under date of January 3, 1944, you wrote this office requesting an opinion, as follows:

"Our attention has been called to Section 11131a, Laws of Missouri 1943 as found on page 1065, which provides for the appointment of a substitute or successor trustee.

"The original trustee's deed includes the necessary information concerning the appointment of the trustee by the County Court but there of course was not a provision made to show the book and page of the court order of the County Court for any substitute or successor trustee. Due to this new section we believe that the trustee's deed should be revised in order to provide a form establishing the trustee and also a provision for the substitute or successor trustee.

"We therefore respectfully request that your office draft a new form for the trustee's deed."

The suggestion made by you is well taken and in accordance with it the form of the Trustee's Deed has

Honorable W. A. Holloway

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January 24, 1944

been revised, and we are herewith enclosing a copy of the portion of the deed which was revised. There is no need for a revision of the back sheet of the deed and for that reason what we are sending you is a revision of the front or first sheet of the deed. In a printing of the deed the back or second sheet should be printed as it exists at the present time.

Respectfully submitted

W. O. JACKSON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOJ:HR

COUNTY BUDGET AC
COUNTY COURT:

County court cannot re-iget or amend
budget after final approval and certi-
fication.

March 17, 1944



Mr. W. A. Holloway
Chief Clerk
State Auditor's Office
Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter of February 26, 1944,
in which you request an opinion of this department. Your
letter reads as follows:

"The 62nd General Assembly enacted House
Bill 112, which bill was approved by the
Governor July 31, 1943, and provides
that under certain conditions County
Courts shall appropriate specific amounts
for the use of certain farm organizations,
which appropriation, ' . . shall be in-
cluded by said County Court in class four
of the budget expenditures.'

"We have a condition wherein a County
Court certified their budget for 1944 to
this office and did not include any appro-
priation under the provisions of the afore-
mentioned act although there was an organ-
ization in the County qualified to receive
such an appropriation. The County Court
now advises that they would like to correct
their budget by amendment and provide for
an appropriation as directed by Section 5
of House Bill 112. However, in order to do
this, it will be necessary for them to
eliminate from their original budget some
appropriations provided for in class five.
This is necessary to establish available
revenue for this appropriation in class
four.

March 17, 1944

"We would like your opinion stating whether the Court can make this corrected amendment and if such a corrected amendment can be made, what would be the liability upon the County Clerk and County Treasurer for participation in the issuance or payment of warrants chargeable against this new appropriation in class four if the issuance and payment of such warrant would invalidate the payment of any claim that might arise against any of the items originally budgeted in class five, which appropriated items would be eliminated by the corrected amendment.

"Due to the existing circumstances, we would appreciate your opinion on these points at your earliest convenience."

Article 17, Chapter 102, Laws of 1943, page 319, provides certain acts to be done and conditions to be met, qualifying county farm organizations for participation in county funds. It must be presumed, since the county court did not include an estimate covering this organization, that the county court performed its duties under the county budget law and that the county farm organization presented no estimate to the county court and otherwise failed to bring itself within the provisions of Article 17, Chapter 102, supra. We will also assume from the date and language of the above request for opinion that the county involved contains a population of 50,000 inhabitants or less, thus limiting the scope of our consideration to Sections 10910 to 10917, R. S. Mo. 1939, inclusive.

Section 10910, R. S. Mo. 1939, provides the general procedure for preparation of the county budget, reading, in part, as follows:

" * * * The county courts of the several counties of this state are hereby authorized, empowered and directed and it shall be their duty, at the regular February term of said court in each year, to prepare and enter of record and to file with the county treasurer and the state auditor a budget of

estimated receipts and expenditures for the year beginning January 1, and ending December 31. * * * "

Section 10917, R. S. Mo. 1939, sets out the specific procedure for revision of estimates of county expenditures that are presented to the county court, also the procedure for approval and certification of the budget, reading, in so far as pertinent, as follows:

" * * * After the county court shall have revised the estimate it shall be the duty of the clerk of said court forthwith to enter such revised estimate on the record of the said court and the court shall forthwith enter thereon its approval. The county clerk shall within five days after the date of approval of such budget estimate, file a certified copy thereof with the county treasurer, taking his receipt therefor, and he shall also forward a certified copy thereof to the state auditor by registered mail.
* * * "

There is no provision in either of these sections of the statutes for alteration after approval by the county court, or revision or resubmission of the budget to the county treasurer and the state auditor. They specifically point out the mode and manner of procedure in arriving at the proper estimate of the county budget in order to keep the county within the estimated revenue of that year.

It was held in the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, 1. c. 860, that this procedure must be followed, the court stating:

" * * * If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such

statutes, too must be strictly construed as against the officer." (Cases cited)

And again the court stated in the case of Gill v. Buchanan County, 142 S. W. (2d) 665, 1. c. 668:

" * * * This court has held that the purpose of the County Budget Law was 'to compel * * * county courts to comply with the constitutional provision, section 12, art. 10' by providing 'ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income.' Traub v. Buchanan County, 341 Mo. 727, 108 S. W. (2d) 340, 342."

In the case of Keane v. Strodman, Sheriff, 18 S. W. (2d) 896, 1. c. 898, the court stated:

" * * * The familiar maxim of 'expressio unius est exclusio alterius' may also be invoked, for the maxim is never more applicable than in the construction of statutes. Whitehead v. Cape Henry Syndicate, 105 Va. 463, 54 S. E. 306; Hackett v. Amsden, 56 Vt. 201, 206; Matter of Attorney General, 2 N. M. 49.

"Certainly where, as at bar, the statute (section 8702) limits the doing of a particular thing to a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done. This is the general rule as to the application of the maxim. * * *"

Since it is the opinion of this department that the county court cannot rebudget or again revise the original budget, it

Mr. W. A. Holloway

March 17, 1944

is unnecessary for us to consider the further questions concerning the liability of the county clerk and the county treasurer under the circumstances set forth in your request.

Respectfully submitted

W. L. H. L. L. L.
Assistant Attorney General

APPROVED:

RON McLELLAN
Attorney General

RCL:ER

REAL ESTATE COMMISSION: Commission does not have power to
APPLICATION FOR RENEWAL request a certificate from appli-
LICENSE: cant as to sales made between date
of expiration of former license and
renewal application.

June 14, 1944

Mr. J. W. Hobbs, Secretary
Missouri Real Estate Commission
222 Monroe Street
Jefferson City, Missouri

FILED

41

Dear Mr. Hobbs:

We have for attention your letter of June 12th, 1944, in which you request the opinion of this department on the questions therein submitted. Your letter sets forth clearly the questions you desire answered in this opinion and we set forth your letter in its entirety, as follows:

"May this Commission request an opinion on the following:

"There appear to be quite a number of licensees issued licenses last year who pay no attention to instructions on applications, renewal applications, and license certificates, that all licenses expire on December 31st of the year in which they are written, and that all licenses must be renewed on January 1st of the ensuing year.

"Many licensees wait for several months before sending their renewal applications for a license and in many cases they negotiate sales through contracts and verbally, then apply for their licenses. Does the Commission have the power, upon receipt of renewal applications, to request a signed certificate to the effect that the applicant had not attempted and had not made sales, loans, leases, etc. during the part of the year in which they had no license?

"This abuse is quite extensive and will continue to occur unless there are some regulatory steps taken."

The Missouri Real Estate Act, found at page 424, et seq., Laws of Missouri 1941, was enacted for the purpose of protecting the legitimate real estate salesmen, dealers and brokers in their profession, and also for the protection of the public who deal with real estate brokers, salesmen and dealers, and requires that the licensees under the Act comply with the laws of the state of Missouri in the operation of their business. There are in this Act certain sections which penalize those who operate without securing from the Real Estate Commission a license to conduct a real estate business.

Section 11 of the Act empowers the Commission to deny an application for a license, or suspend or revoke a license issued, only after a hearing, of which the applicant or licensee affected shall be given at least ten days' written notice specifying the reason for denying the applicant a license. And there are certain regulatory provisions governing the action of the Commission in connection therewith.

It will be observed that by Section 16 of the Act no person, copartnership, corporation or association, acting in the capacity of a real estate broker or real estate salesman, shall bring or maintain an action for a real estate commission unless he was a licensed real estate broker or salesman at the time when the alleged cause of action arose. So, any of the above entities could not collect a real estate commission unless they had a license at the time the alleged cause of action arose. Hence, any person not having a license would jeopardize their commission and could not collect same in the state of Missouri.

Further, by Section 17 of the Act a person who violates any provision shall be guilty of a misdemeanor and, if a person, be punished by a fine of not more than \$500 or by imprisonment in the county jail, not exceeding six months, or by both such fine and imprisonment, and if a corporation shall be punished by a fine of not more than \$1,000. It will be seen, therefore, that there exists in Missouri a very severe penalty for any of the above entities to prosecute a real estate business without first procuring a license; and, it must be observed also, that until the enactment of this Act there was no criminal penalty for operating without a real estate license.

June 14, 1944

The General Assembly therefore has placed in the hands of the prosecuting officers a weapon to enforce the provisions of the law and also, the real estate dealer who violates this Act may lose his real estate dealer's commission.

We think your inquiry is whether the Commission has the power and is authorized, upon the receipt of renewal applications to request a signed certificate to the effect that the applicant had not attempted and had not made sales, loans, leases, etc., between the time of the expiration of his former license and the date of the application for a renewal, and, in the event he refuses or neglects to sign a certificate incorporating the above facts, that the Commission may refuse to grant a license until the applicant has complied with such request. In other words, may you make such an enforceable rule?

We do not think it would be practicable for the Commission to make such a rule and regulation and, if the applicant did comply with it, deny a license to him solely on that ground, because Section 11 does not make that one of the prerequisites to securing a license. Of course, if a person makes an application for a license and the Commission finds that the applicant has violated the provisions of the Missouri Real Estate Act it may, in its judgment, refuse to issue a license.

CONCLUSION

It is, therefore, our opinion that the Commission does not have the power to make such a rule and enforce same, solely upon the ground that the applicant for a renewal of his license has not complied with such rule and regulation.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

CRH:CP

OFFICERS:) Whether enlistment in United States Maritime
MILITARY SERVICE:) services creates a vacancy, is a matter for
judicial interpretation.

June 30, 1944



Honorable Paul S. Hollenbeck
Judge of Probate Court
Maries County
Vienna, Missouri

Dear Sir:

The Attorney General acknowledges receipt of your letter of June 23, 1944, requesting an opinion of this Department. Your letter of requests reads as follows:

"Some time ago I was advised in an opinion from your office that in the event of my enlistment in the Army or Navy I could retain my office upon being discharged from such service, in the event my term had not expired during said service. As I have been rejected twice from the Army I now contemplate enlistment in the U.S. Maritime Service. As you no doubt know, this service is not in the same category in many respects as is the other branches.

"My question is this: In event I enlist in the Maritime Service can I retain my office upon being discharged from such service within the duration of my present term of office?"

There are two cases involving the induction of a circuit judge and a circuit clerk, respectively, into the armed forces, (1) State ex rel. McGaughey v. Grayston, 163 S. W. (2d) 335 and (2) State ex inf. McKittrick v. Wilson, 166 S. W. (2d) 499. The Grayston case held that there is no incompatibility in holding the office of circuit judge and a commission in the Army. It is quoted with approval in the Wilson

June 30, 1944

case on the proposition that Article II, Section 18 of our Constitution, providing that no officeholder shall hold office without personally devoting his time to the performance of the duties of the office, was intended to prevent farming out of the performance of the duties of that office for profit of the officeholder, and said article did not apply to the situation in either of these cases. The Wilson case held that there was no forfeiture of office by virtue of induction of a circuit clerk into the armed forces.

We have previously rendered an opinion in line with the above two cases to the effect that in the event of your enlistment or induction into the armed forces, no vacancy would be created thereby. We have also previously held that the United States Merchant Marine was not under the direct supervision of the Army or Navy but was established under Section 1126, U. S. C. A., Title 46, and is under the United States Maritime Commission.

The court stated in the Grayston case (1. c. 341), "In order to survive it is necessarily the policy of the State law to aid, not impede our common defense." Whether enlistment in the United States Maritime Service would create a vacancy or amount to a forfeiture of office or constitutes grounds for removal from office, would be a matter for judicial interpretation.

The above and foregoing constitutes the opinion of this Department.

Respectfully submitted,

RALPH C. LASHLY
Assistant Attorney General

APPROVED:

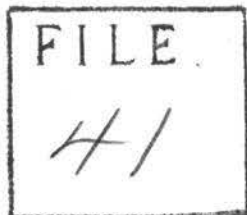
ROY McKITTRICK
Attorney General

RCL:EG

MISSOURI REAL ESTATE COMMISSION: The date of the conviction
fixes the jurisdiction of
REVOCATION OF LICENSE: the Commission in revoca-
tion of license. Using the
mails to defraud in connec-
tion with S.E.C. regulations
comes within the provisions
of Section 14 of the Missouri
Real Estate Act relative to
revocation of licenses.

October 11, 1944

Mr. John W. Hobbs, Secretary
Missouri Real Estate Commission
222 Monroe Street
Jefferson City, Missouri



Dear Mr. Hobbs:

This is to acknowledge receipt of your letter of
September 16th, 1944, in which you request the opinion
of this department. Your letter is as follows:

"May the Missouri Real Estate Commission
request an opinion from your office on
the following:

"The Midwest Realty Company, a corporation
of St. Louis, Missouri has filed an appli-
cation with this Commission for a corpora-
tion license and the active officers were
the officers of the Lichtenstein Estate
Inc. who were before the U. S. Federal
Court in St. Louis and were fined for
using the mails to defraud and violation
of the S.C.C. regulations.

"1. If the Federal Court procedure was
previous to the Missouri Real Estate
License Law becoming effective which date
was January 1, 1942 could the courts'
findings be used against the Midwest
Realty Corporation and its members.

"2. Whether the act which was using the mails to defraud and violating the S.C.C. regulations, could be classed with criminal acts and others as set out in Section 14 of the Law creating the Missouri Real Estate Commission."

In this opinion we are not passing on the application of the Midwest Realty Company, a corporation of St. Louis, Missouri, for a license under the Missouri Real Estate Act, and are merely answering the questions propounded in your letter.

Replying, therefore, to your first question, we refer to Section 14 of the Missouri Real Estate Act, found at page 430, Laws of Missouri, 1941, which provides:

"Where during the term of any license issued by the commission the licensee shall be convicted in a court of competent jurisdiction in the state of Missouri or any state (including federal courts) of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses and a duly certified or exemplified copy of the record in such proceedings shall be filed with the commission, the commission shall revoke forthwith the license by it theretofore issued to the licensee so convicted. No license shall be issued by the commission to any person known by it to have been convicted of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses, or association or copartnership of which such person is a member, or to any association or copartnership of which such person is an officer, or in which as a stockholder such person had or exercises a controlling interest either directly or indirectly."

Section 1, of the Missouri Real Estate Act, page 425, Laws of Missouri, 1941, provided that the Missouri Real Estate Act should become effective after January 1, 1942.

It will be observed that under Section 14, supra, a conviction in a court of competent jurisdiction in the State of Missouri, including the federal courts, of certain designated offenses makes it mandatory on the Commission to revoke a license, upon the filing of a duly certified or exemplified copy of the record of such proceedings with the Commission, where during the term of the license issued by the Commission the licensee shall be convicted. The statute fixes the date as of the date of the conviction and not when the crime was actually committed. So, if any licensed person should be convicted during the term of the license the Real Estate Commission would have jurisdiction of the matter.

Referring to your second question, we refer again to Section 14, supra, of the Act, where it will be noted that convictions of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses are the crimes for which a license shall be revoked, upon filing a duly certified or exemplified copy of the record in such proceedings with the Commission.

We think that using the mails to defraud under the Federal statute would be an offense which would come within the purview of said Section 14. It would seem that the Act made it mandatory on the Commission to revoke the licenses of those who had been convicted of offenses involving money transactions or transactions involving property, and those crimes which would likely come within the business of a real estate dealer. And, applying the rule of eiusdem generis, it is our opinion that other like offense or offenses would include using the mails to defraud and come within the terms of Section 14. Also, we think using the mails to defraud would be included under the offense of obtaining money under false pretenses. In the very recent case of *Neibling v. Terry*, 177 S. W. (2d) 502, where the disbarment of an attorney was involved, the court said, at l. c. 503, that the offense of using the mails to defraud involves moral turpitude, citing cases from other jurisdictions.

We have previously ruled to your Commission that a plea of nolo contendere in the Federal Court of certain crimes is a conviction within the meaning of the Missouri Real Estate Act. And, the Circuit Court of Cole County, in the case of Meyer v. Missouri Real Estate Commission, sustained our construction of this statute. However, this case has been appealed by the plaintiff and was argued in the Kansas City Court of Appeals on October 6th, 1944. The opinion has not been handed down, and, it would seem advisable to await the decision of this case in the Court of Appeals on the question of whether a plea of nolo contendere is a conviction within the meaning of the Act.

CONCLUSION

Therefore, it is our opinion that (1) the date of the conviction in the court and not the date of the crime fixes the time when the Commission takes jurisdiction for the purpose of revocation of a license; and, that (2) using the mails to defraud, in connection with the violation of the S.E.C. regulations, comes within the purview of Section 14, of the Missouri Real Estate Act, that is, comes within the designated crimes of obtaining money under false pretenses, criminal conspiracy to defraud, or other like offense or offenses.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

CRH:CP

APPROVED:

VANE C. THURLO
(Acting) Attorney General

DEPUTY RECORDER: Compensation of Deputy Recorder must be paid from fees earned by the office of Recorder of Deeds.

June 15, 1944

Mr. J. M. How
Assistant Prosecuting Attorney
Mississippi County
Charleston, Missouri



Dear Sir:

We acknowledge receipt of your letter of May 29th, 1944, requesting an opinion from this department, which letter, omitting address and signature, is as follows:

"Prior to 1943 the offices of Circuit Clerk and Recorder in this County were combined. January 1st, 1943, they were separated. Mr. Oliver F. Goodin became Recorder of Deeds. It was his intention to appoint Mr. O. T. Dalton as his deputy, but Mr. Dalton was then in the Collector's office and would not be relieved from duty there until after the March settlement of that office. Mr. Oscar I. Oliver was appointed to fill the position of deputy recorder temporarily. Mr. O. T. Dalton began his duties April 3rd, 1943. Mr. Oliver was being paid at the rate of \$1600.00 per year. The compensation agreed upon for Mr. Dalton was \$1700.00 per year. The only record I could find in the County Clerk's office was one made January 12th, 1943, recorded in Book 16 at page 209, merely stating that Oscar I. Oliver was appointed deputy recorder at a salary of \$1600.00 per year. I have failed to find any record whatever of Mr. Dalton's appointment, but I am informed that he has been paid monthly on the basis of \$1700.00 per year.

"In 1943 the fees of the Recorder's office were more than enough to enable the Recorder to retain \$4000.00 and pay the deputy \$1700.00. After the new marriage law was passed, the license fees fell off to such an extent that there seems to be a question as to the fees of the office amounting to \$5700.00 in 1944.

"The question to which an answer is desired is this - If the fees do not amount to \$5700.00 in 1944, is the difference to be paid by the County Court, or is it a matter for the Recorder and his deputy to work out between themselves?

"I find no statute dealing directly with this question. Section 13,187, R. S. Mo. 1939, seems to take it for granted that the fees will be sufficient to pay the deputy after the recorder has retained \$4000.00.

"One of the Judges of the County Court spoke to me about the Recorder's settlements with that court and indicated that the Recorder would like to make his settlements as required by law showing the amounts collected and distributed, but not paying in any surplus at the end of each year, but make the payment at the end of his four year term. It hardly seems to me that this is within the contemplation of the statute, because if he did not make proper payment for the first year, the three year statute of limitations might cause trouble."

Mississippi County, as disclosed by the 1940 census, has a population of 23,149. The Recorder of Deeds of Mississippi County is, therefore, under the provisions of Sections 13160 and 13187, R. S. Mo. 1939, with reference to the appointment of deputies and compensation of the Recorder and such deputies.

Section 13160, R. S. Mo. 1939 provides as follows:

"In all counties therein the offices of clerk of the circuit court and recorder of deeds have been or may be separated, the recorder of deeds may appoint in writing one or more deputies, to be approved by the county court of their respective counties, which appointment, with the like oath of office as their principals, to be taken by them and indorsed thereon, shall be filed in the office of the county clerk. Such deputy recorders shall possess the qualifications of clerks of courts of record, and may, in the name of their principals, perform the duties of recorder of deeds, but all recorders of deeds and their sureties shall be responsible for the official conduct of their deputies. But no recorder now holding office shall appoint such deputy or deputies until he shall have entered into a new bond to the state in such sum, manner and form as is now required by law."

Section 13187, R. S. Mo. 1939, provides:

"The recorder of each county in which the offices of recorder of deeds and clerk of the circuit court are separate shall keep a full, true and faithful account of all fees of every kind received, and make a report thereof every year to the county court; and all the fees received by him, over and above the sum of four thousand dollars, for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury, to form a part of the jury fund of the county."

Section 13160, supra, does not leave to the discretion of the County Court the amount of compensation that should be paid to a deputy recorder.

Section 13187, supra, allows the Recorder of Deeds to retain as his compensation from fees received by him not to exceed \$4,000 per year and, in effect, allows him credit for a reasonable amount paid for deputy hire upon the fees earned by him in excess of the \$4,000 allowance.

It is thus seen that the sole method of compensating a Recorder of Deeds and his deputies in counties such as Mississippi County is from the fees earned by that office. The necessity of deputy hire and the amount to be paid the deputy is left to the reasonable discretion of the County Court and is allowed as a credit to the recorder when he makes his settlement with the County Court.

In State ex rel. Vernon County v. King, 136 Mo. 309, 1. c. 319, the Supreme Court said:

"We are of the opinion, therefore, that the allowance to the recorder of reasonable compensation for necessary hire of assistants was not a matter of mere discretion with the county court. In his settlement, the recorder was entitled to a credit for the amount so paid; * * *"

In the above case it was shown that the Recorder of Deeds had collected in two years \$9,519.00, or \$5,519.00, more than he was entitled to retain as salary and that he actually paid the sum of \$2,810.00 for deputy hire during those two years. Apparently no order was ever made by the County Court fixing the compensation of his deputy. In holding that there could be no recovery against the recorder and his bondsmen, the following was ruled:

"But assuming that the settlement was fairly made, and that the payment of \$4,000 was on account thereof, and that a balance of \$1,519 remained unpaid, yet the amount was subject to the credit of whatever necessary sum was actually paid for the hire of clerks and other assistants. The agreement in respect to the

allowance of such credit should be given as broad a meaning as that given to the statute; that is, that defendant should have a credit for all amounts actually paid by him which were reasonable and necessary for the proper performance of the duties of the office."

The rule with reference to the compensation of officers has been stated in *Nodaway County v. Kidder*, 129 S. W. (2d) 857, 1. c. 860, as follows:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S. W. 195, 196; State ex rel. Wedding v. McCracken, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

CONCLUSION

In the opinion of this department a deputy recorder of deeds in counties such as Mississippi County, Missouri,

Mr. J. M. How

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June 15, 1944

may be compensated only from fees earned by the office of recorder of deeds, and that the county is not liable for his salary and cannot properly pay any part thereof.

Respectfully submitted,

E. B. WOOLFOLK
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

EBW:CP

VITAL STATISTICS. : Local Registrars in cities 10,000
: to 30,000 must supply city Board
: of Registrars monthly list of deaths
: of persons over 21 years of age,
: during preceding month.

June 5, 1944

Mr. O. S. Hull, Jr.,
Director Vital Statistics
The State Board of Health of Missouri
Jefferson City, Missouri



Dear Mr. Hull:

This will acknowledge the receipt of your letter of May 25, 1944, requesting an opinion of this office, which is as follows:

"I have received the following letter from the local registrar of Adair County:

'Mr. O. S. Hull, Director
Vital Statistics
State Board of Health
Jefferson City, Missouri

'Dear Mr. Hull:

'I have been informed by the City of Kirksville that I should hand them a list of all legal voters who die each month. In fact they are just now asking me to bring it up to date from the time of the last census.

'This is quite a little task and I am wondering if I can legally charge them for this service.'

'Your advice will be appreciated.

Yours very truly,

Mrs. J. L. Wagner.'

"I would like to have an opinion as to whether or not a local registrar is to furnish cities with a list of legal voters who die and if they can make a charge for this service. An early reply will be appreciated."

June 5, 1944

Sec. 11947, R. S. Mo., 1939, provides:

"It shall be the duty of the person or official having charge of the vital statistics of any such city to furnish said board of registrars, monthly, a report of the names, sex, color and previous residence of all persons over 21 years of age who have died during the preceding month. Any registrar of vital statistics violating the provisions of this section shall be deemed guilty of a misdemeanor, and fined not less than \$10.00 and not more than \$50.00. (laws 1933, p. 239, Sec. 12.)"

The plain words of this statute require the local registrar to furnish the Board of registrars of cities between 10,000 and 30,000 inhabitants with this information. There is no fee provided in the statute for this service, nor is there any provision in the general statute relative to fees of local registrars, providing a fee for a service of this kind. (Sec. 9780 R. S. Mo., 1939.)

A public official claiming compensation for official duties performed must point out the statute authorizing such payment. Nodaway V. Kidder, 129 S. W. (2d) 857.

CONCLUSION.

It is therefore, the conclusion of this office that the local registrar of vital statistics of cities between 10,000 and 30,000 population must supply the city board of registrars with monthly lists of all over 21 years of age, who died during the preceding month and no fee is provided in the statute for this service.

Respectfully submitted

APPROVED:

ROBERT J. FLANAGAN
Assistant Attorney General

ROY McKITTRICK
Attorney General

RJF:Lec

SHERIFFS:

Not authorized to make a charge for attendance on the juvenile court and another charge for attendance on the circuit court on the same day, in the same circuit.

July 28, 1944

8-14
FILED
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Honorable W. C. Huffman
Presiding Judge
Dunklin County Court
Kennett, Missouri

Dear Sir:

We are in receipt of your letter of July 24, 1944, in which you request an opinion of this department. Your letter reads as follows:

"The Sheriff of Dunklin County has presented us with a bill for \$9.00 for waiting on Circuit Court on June 5th and a bill for \$9.00 for waiting on Juvenile Court on the same day.

"Will you kindly advise if the \$18.00 charge is a legal obligation of Dunklin County where Circuit Court and Juvenile Court were held on the same day?

"A. P. Marshall was duly notified to appear as a witness in Circuit Court but failed to appear. The Circuit Court had the Sheriff bring him into court at a cost of \$1.00 fee for serving attachment for witness and \$6.00 mileage.

"The Sheriff's costs were taxed against Dunklin County instead of against the attached witness.

"Will you kindly advise if the \$7.00 sheriff's costs for attaching a witness assessed against Dunklin County by the Circuit Court is a legal obligation of Dunklin County?"

Section 13411, R. S. Missouri, 1939, reads, in part, as follows:

"Fees of sheriffs shall be allowed for their services as follows:

* * * * *

"For attending each court of record or criminal court and for each deputy actually employed in attendance upon such court the number of such deputies not to exceed three per day \$3.00"

Section 13133, R. S. Missouri, 1939, provides:

"Any sheriff may appoint one or more deputies, with the approbation of the judge of the circuit court; and every such appointment, with the oath of office indorsed thereon, shall be filed in the office of the clerk of the circuit court of the county."

We have previously held that, under the above two sections of the statutes, the sheriff is entitled to \$3.00 per day while actually in attendance on a court of record or criminal court, and that the sheriff may appoint not to exceed three deputies for the performance of these duties, who shall each be entitled to a fee of \$3.00 per day.

The question presented here is whether attendance on the circuit court and the juvenile court constitutes attendance on two courts of record, thereby justifying two charges by the sheriff and his deputies.

The following citation appears in the case of *In re Zartman's Adoption*, 65 S. W. (2d) 951, 1. c. 954:

"One contention of the appellants is that the juvenile court of Jackson County is a court of limited and special powers,

a creature of the statute, and it cannot exercise any powers not specifically given. It is, therefore, argued that, as the statutes, sections 14073 to 14081, R. S. 1929 (Mo. St. Ann. secs. 14073-14081, pp. 822-828), relating to the adoption of children, do not confer on such courts the general power to set aside or annul decrees of adoption, no such power exists. The trouble with this argument is in the false premise that juvenile courts are courts of limited and special powers. On the contrary, such a court is merely a division or branch of the circuit court, a court of general and common-law powers and jurisdiction. The statute, section 14073, specifying what court shall hear and determine cases involving the adoption of children, specifies the juvenile division of the circuit court. The Juvenile Court Act, of which section 14162, R. S. 1929 (Mo. St. Ann. sec. 14162, p. 874), designates the courts which shall have jurisdiction of cases coming within the terms of the act, says that the Cape Girardeau court of common pleas and circuit courts shall have such jurisdiction, and 'may for convenience be called the juvenile court.' Section 14137, R. S. 1929 (Mo. St. Ann. sec. 14137, p. 854), relating to juvenile courts in counties of fifty thousand population or over, is to the same effect, with the further proviso that the circuit judges of such county shall designate one of their number to hear and determine cases coming under such act. There is, therefore, no such thing as a juvenile court, but only a circuit court called by that name for convenience. * * *

In the case of *In re McFarland*, 223 Mo. App. 826, 12 S. W. (2d) 520, 1. c. 527, the court stated:

* * * * The so-called 'juvenile court' is but a division of the circuit court and is in fact presided over by the same judge.

July 28, 1944

The statute gives to the circuit court original jurisdiction in all matters appertaining to the treatment and correction of delinquent minors, and when acting in that capacity it is called the juvenile court. Section 1136, R. S. Mo. 1919.

"The adoption statute itself refers to 'the juvenile division of the circuit court.' It is then not a separate court, but a division of the circuit court, which certainly has original, general, common-law jurisdiction. * * * "

The above cases constitute ample authority for the statement that the juvenile court is but a division of the circuit court. The sheriff then is making a charge for attendance at two sessions of the circuit court held on the same day, which is in direct conflict with the provision of the statute, quoted above, allowing him or his deputies but \$3.00 per day for such attendance.

We are unable to render an opinion on the question of Dunklin County's liability to pay the costs of attaching a witness because we do not have enough of the facts. You should have stated whether the suit was of a civil or criminal nature -- if criminal, whether the charge was a felony or a misdemeanor, whether the attached witness was on behalf of the State or the defendant, and whether plaintiff or defendant was successful.

CONCLUSION

It is the opinion of this department that the Sheriff of Dunklin County is not authorized to make a charge for at-

Honorable W. C. Huffman

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July 28, 1944

tendance on the juvenile court and a similar charge for attendance on the circuit court on the same day.

Respectfully submitted

RALPH C. LASHLY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RCL:HR

MISSOURI SCHOOL for DEAF: Board of Managers must first obtain authority through an appropriate act of General Assembly before a building may be razed.

May 29, 1944



Mr. Truman L. Ingle, Superintendent
Missouri School for the Deaf
Fulton, Missouri

Dear Sir:

We are in receipt of your opinion request which reads as follows:

"We have here at the Missouri School for the Deaf a building which has been condemned as unsafe. Our Board of Managers has authorized the wrecking of this building. It has not been occupied for more than four years, but has been a constant source of expense in keeping the roof in proper repair and it is felt that the wise thing to do is to eliminate this expense as quickly as possible. The board has instructed me to write asking for an opinion as to whether or not it is within the legal authority of the board, through the State Purchasing Agent, to ask for bids on the wrecking of the building.

"The board desires to be absolutely within their jurisdiction in this matter. The plan is that whatever salvage may be in the building will go as part, or all, pay for the wrecking.

"I will appreciate it very much if we may have an opinion from your office in time for our next regular board meeting, which will be Friday, June 9."

May 29, 1944

In this connection we wish to call your attention to Section 10864, Revised Statutes of Missouri 1939, which section reads as follows:

"The board of managers of each school shall have the care and control of all the property, real and personal, owned by such school, and the title to all real estate or personal property now owned by such school, or by the state for its use, or that may hereafter be purchased by or donated to such school shall be vested in such board of managers of the respective schools, for the use and benefit of the said school. The board of managers of either school shall not sell or in any manner dispose of any real estate belonging to the school without an act of the general assembly authorizing such sale or disposal of such real estate. The boards of managers shall provide their respective schools with an official seal."

From the reading of the above section, supra, we note that the section specifically provides:

"The board of managers of either school shall not sell or in any manner dispose of any real estate belonging to the school without an act of the general assembly authorizing such sale or disposal of such real estate."

Due to the fact that the building is a part of the real estate, it is our view that the Board of Managers does not have the authority to raze said building described in the opinion request without first obtaining authority through an appropriate act of the General Assembly authorizing the disposal of such building.

To sustain our position we call attention to the case of *Keane v. Strodman*, 18 S.W. (2d) 896, l.c. 898, wherein the court said in part:

"Certainly where, as at bar, the statute (section 8702) limits the doing of a particular thing to a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done. This is the general

May 29, 1944

rule as to the application of the maxim. Even more relevant under the facts in this case is the interpretation given to it by the Kansas City Court of Appeals in *Dougherty v. Excelsior Springs*, 110 Mo. App. 623, 626, 85 S.W. 112, 113, to this effect: 'That when special powers are conferred, or where a special method is prescribed for the exercise and execution of a power,' that exercise is 'within the provision of the maxim * * * and * * * forbids and renders nugatory the doing of the thing specified except in the particular way pointed out.'

See also the case of *State ex rel. Kansas City Power and Light Company v. Smith*, State Auditor, 111 S.W. (2d) 513, 1.c. 514, par. 2, and the case of *State ex. inf. Conkling ex rel. Hendricks v. Sweaney*, 270 Mo. 685, 1.c. 692, 195 S.W. 114, 116.

We are mindful that the statute, *supra*, uses the word "disposal" in connection with the word "sale." It is our view that the word "disposal" should be construed in its ordinary meaning, and to this end find that Webster's New International Dictionary, Second Edition, has this to say in defining the word "disposal":

"To get rid of; to put out of the way; to finish with; as, to dispose of rubbish; to dispose of the morning's mail. To transfer to the control of someone else, as by selling; to alienate; part with; relinquish; bargain away."

Conclusion

It is the opinion of this department that a building situated on lands owned by the Missouri School for the Deaf cannot be razed by the Board of Managers of such school without first obtaining authority through an appropriate act of the General Assembly of the State of Missouri authorizing such board so to do.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

BRC:ml

CONFEDERATE HOME: Five questions relative to the transfer of the management of the Confederate Home from the Board of Trustees of such home to the Board of Managers of the State Eleemosynary Institutions.

January 11, 1944



Honorable Ira A. Jones, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jones:

This department acknowledges receipt of your several letters, dated November 15 and 16, 1943, in which you ask the opinion of this office. Said letters read as follows:

(1)

"Under Senate Bill 178, transferring the Confederate Home to the Board of Managers of the Eleemosynary Institutions, we understand there is an endowment fund of some \$24,110 that is invested in Government bonds, and the bonds are kept in a Bank in Marshall by the treasurer of the old Board.

"Are these funds to be turned over to the Board of Managers of the Eleemosynary Institutions?"

(2)

"Under Senate Bill 178, transferring the Confederate Home to the Board of Managers of the Eleemosynary Institutions there has been kept what is called a Farm Fund Account, by the old Board.

"We wish to ask if the old Board is to turn over to the Board of Managers of the Eleemosynary Institutions this Farm Account Fund. We understand there is some \$1,800 in this fund."

(3)

"Under Senate Bill 178, the question came up at the meeting of the two Boards as to whether funds left in the treasury with the State Treasurer from the appropriation that was made to the Board of Trustees of the Confederate Home were to be transferred to the Board of Managers of the Eleemosynary Institutions.

"We understand that there is between \$7,000 and \$8,000 that has not been expended under the old appropriation. We will await an opinion from you on this matter."

(4)

"Under Senate Bill 178 we contemplate moving approximately 50 women from some of the other mental institutions to Higginsville. There is no provision in the bill that we can charge the Counties \$6.00 per month at Higginsville.

"Is it possible for us to assume, under the statutes, that we can charge the \$6.00 per month, and put it into an earnings fund for Higginsville, or could we charge the \$6.00 a month from the hospital from which the patients come, through their books. After getting this \$6.00 a month either way, is it possible for us to spend this earnings fund at Higginsville?"

(5)

"In 1933 you gave an opinion that the farm account at Higginsville need not be deposited in the State Treasurer's Office, but that it could be used in the Confederate Home. The Board of Managers of the Eleemosynary Institutions is taking this over under Senate Bill 178.

"Is it possible for us to continue this farm account as has been done in the past under

your opinion, or must we deposit this money with the State Treasurer? If it is deposited with the State Treasurer, is it possible for us to use it, there being no appropriation for earnings under House Bill 664?"

I.

Under your letter No. 1 set out above we wish to call your attention to Section 15132 of Senate Bill 178, to be found in Laws of Missouri, 1943, at page 955, which provides in part as follows:

"The Board of Managers of the State Eleemosynary Institutions shall be custodians of any endowment or other funds pertaining to the Confederate Home and shall have authority to accept gifts, donations or bequests for use of the Home or for any inmate thereof. * * *"

The purpose of Senate Bill 178 seems to be the abolishing of the Board of Trustees of the Confederate Home and the substitution in its place of the Board of Managers of the State Eleemosynary Institutions. Under the provisions of this act the latter board assumes control of the Confederate Home at Higginsville and all of the property attached thereto and owned by them. As a result, it is our opinion that any endowment funds which were held by the Board of Trustees of the Confederate Home for the benefit of such home should now be turned over to the Board of Managers of the State Eleemosynary Institutions, which board has assumed control of the Confederate Home. We feel that the portion of the act cited above bears out our view that such funds should be under the control of the Board of Managers of the State Eleemosynary Institutions.

We further might cite you to Section 15130, which is found on page 954 of the Laws of Missouri, 1943, which in part provides the following:

"The custody of any property at or belonging to the said Home is hereby transferred

to the Board of Managers of the State
Eleemosynary Institutions. * * * * *

We again find that the apparent intention of the Legislature is that all property of any kind whatsoever shall be transferred to the Board of Managers of the State Eleemosynary Institutions. As a result of such provisions it is our opinion that the endowment fund of some \$24,110 should be turned over to the Board of Managers of the State Eleemosynary Institutions. We could not hold otherwise since there is no longer any Board of Trustees of the Confederate Home to hold such money and it must be under the control of some person or board, and Senate Bill 178 clearly provides that such control shall be exercised by the Board of Managers of the State Eleemosynary Institutions.

II.

The second letter, which is set out above, requests an opinion of this department as to whether a Farm Fund Account kept by the old board of the Confederate Home should be transferred to the Board of Managers of the State Eleemosynary Institutions.

Under an opinion of this department written in 1933 it was held that there could be set up a Farm Fund Account and that any moneys received by the Board of Trustees of the Confederate Home from the sale of products from the farm connected with such institution might be kept in a separate Farm Fund Account and were not required to be turned into the State Treasury. Apparently this Farm Fund Account of which you speak is the account set up under and by virtue of such opinion. In this opinion written by Mr. Lamb, formerly of this department, he bases his finding that the moneys thus received might not be turned into the State Treasury, on an exception set out in Section 13932 of the Revised Statutes of Missouri for 1929. This section was later changed to Section 15133 of the Revised Statutes of Missouri for 1939, and it will be noticed that under Senate Bill 178, in question here, that such Section 15133 has been repealed and there is no new section set up in which the exception relied upon by Mr. Lamb is made. In 1933 the Legislature passed Senate Bill 124, which pertained to the deposit in the State Treasury of all fees, funds and moneys from whatsoever source received from any department, board, etc., in the State of Missouri.

This section later became known as Section 13051, R. S. Mo. 1939, and provides in part as follows:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated.
* * *."

We further wish to call your attention to Section 43 of Article IV of the Constitution of the State of Missouri, which provides as follows:

"All revenue collected any moneys received by the State from any source whatsoever shall go into the treasury, * * * * *"

In view of the above provisions, it is the opinion of this department that any money received from the sale of products produced on the farm of the Confederate Home shall be deposited in the Treasury of the State of Missouri to the credit of the institution and become subject at a later date to appropriation for the operation of such institution. The question as to whether or not the old board of the Confederate Home should turn over any amount in a Farm Fund Account to the Board of Managers of the State Eleemosynary Institutions, we feel should be answered in the affirmative. As stated above in this opinion, there is no longer a Board of Trustees of the Confederate Home and it is clearly the intention of the Legislature that the business of such institutions shall be handled by your Board. We feel that this Farm Fund Account in the amount of some \$1800 should be turned over to the Board of Managers of the State Eleemosynary Institutions who should in turn see that such fund is deposited with the State Treasurer of Missouri, since we feel, as previously stated, that your Board has no authority

to set up a Farm Fund Account and use it in the manner which was formerly done by the old Board of the Confederate Home.

III.

In your third letter set out above the question arises as to whether funds left in the State Treasury for the Trustees of the Confederate Home, are to be transferred to the Board of Managers of the State Eleemosynary Institutions.

As previously stated, it is the apparent intention of the Legislature of the State of Missouri that the Board of Managers of the State Eleemosynary Institutions shall become the custodians of any endowment or any other funds pertaining to the Confederate Home as set out in Section 15132 of the Laws of Missouri, 1943, found at page 955. This money was appropriated by the Legislature for the benefit of such institution and the mere fact that the government of such institution has been transferred from the old Board to your Board should not defeat the appropriation, since the institution must be kept going. Consequently, it is the opinion of this department that such appropriation fund should be transferred to the Board of Managers of the State Eleemosynary Institutions.

IV.

Your fourth letter set out above requests an opinion as to whether or not persons transferred from other mental institutions to Higginsville shall be charged \$6.00 per month as provided for under the statutes pertaining to the upkeep of patients in such institution.

Section 9328, R. S. Mo. 1939, in speaking of the upkeep of the insane poor, makes the following provision:

"The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto. The counties thus sending shall pay semi-annually, in cash, in advance, such sums for the support and maintenance of their insane poor, as the

board of managers may deem necessary, not exceeding six dollars (\$6.00) per month for each patient; * * * * *

For the purposes of this opinion we must assume that the fifty women which you contemplate transferring from other mental institutions to Higginsville will come under the classification of "insane poor." In a conversation which the writer had with you, you stated in explanation of this one question that this transfer was contemplated in view of the overcrowded conditions of the various state mental hospitals. Your Board has authority under Section 15133 of the Laws of Missouri, 1943, found at page 955, to transfer persons from certain institutions to the Confederate Home at Higginsville. This section of the statutes provides the following:

"Said Board of Managers of the State Eleemosynary Institutions shall have full power in its discretion to transfer to said Home any aged, infirm person who now is, or hereafter may be, properly within its jurisdiction as an inmate of any state hospital; * * * * *"

If any aged or infirm person is transferred from any other hospital in this State, who would also be classified under the term "insane poor," as provided under Section 9328 aforesaid, we feel then that the county from which such person has been sent should be liable in the amount set up by statute. We feel that if a person is sent to a state hospital as an indigent person and as such the county of the patient's residence is liable for the upkeep of such person, that it would not make any difference as to which particular hospital such person was sent. In other words, we do not feel that a county can escape its liability set up by statute by the mere fact that the patient sent from such county is transferred to another state institution in an emergency due to the overcrowded conditions of the various institutions. As stated in your conversation with the writer relative to this matter, it might be possible that the records of the inmates would necessarily be required to be kept at the institution in which such person was first assigned. However, that is a matter we feel within the discretion of the Board of Managers of the State Eleemosynary Institutions.

It will be noted that in Section 9328, supra, provision is made that the county courts shall have power to send to "a state hospital" indigent persons and should pay a certain specified

amount for their upkeep per month. Under such provision and reasoning we feel that it is possible for said patients to be transferred from a mental institution to the Higginsville Home and that the counties shall be required to pay the stipulated amount each month for their upkeep.

You also request us to state whether the earnings of \$6.00 per month, as specified in your request, could be spent at Higginsville if that amount is collected at the institution where the patient was originally assigned. We feel that if the amount is collected at the institution where the patient is first assigned, that such earnings must be deposited in the State Treasury for the benefit of such institution and could not be transferred to a fund to be used for the benefit of the Higginsville Home. As a result we feel that the only solution to the problem would be that a plan be worked out whereby the patients could be originally sent to this Home, since, under the provisions of Senate Bill 178, we feel that a county would have the authority to send aged and infirm people to the Confederate Home in the first instance. This would prevent any question arising as to the proper allocation of the funds.

V.

Your final request in the fifth letter set out above, we feel has been answered under our remarks in answer to your second letter which pertains to the Farm Fund Account.

As stated under such section of this opinion, we feel that any moneys received from the sale of products from the farm connected with the Confederate Home shall be turned into the State Treasury of Missouri and at a later date there can be an appropriation made from the earnings of such institution.

Conclusion

Therefore, it is the opinion of this department that (1) the endowment fund mentioned in your first letter shall be turned over to the Board of Managers of the State Eleemosynary Institutions; (2) that the Farm Fund Account shall be turned over to the Board of Managers of the State Eleemosynary Institutions, who shall in turn deposit such funds with the State

Hon. Ira A. Jones

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January 11, 1944

Treasurer of Missouri; (3) that the appropriation remaining to the benefit of the Confederate Home shall be transferred to the Board of Managers of the State Eleemosynary Institutions; (4) that patients can be transferred from other state hospitals to the Confederate Home and a charge can be made for the upkeep of such persons in such home; and (5) that all moneys received from the sale of any products produced on the farm at the Confederate Home shall be deposited in the State Treasury.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG

MARRIAGE: Eleemosynary Institution laboratories are not approved by the State Board of Health to permit them to make blood tests under section 3364A.

January 20, 1944



1-27
Honorable Ira. A. Jones, President
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your letter of January 17, 1944, wherein you make the following inquiry:

"Under the new pre-marital law, requiring Wasserman, Kahn and Kline tests to be made, our laboratories have been asked to make such tests, and we have refused to do so.

"Now the question comes up as to whether we will make them for our own employees. A part of our service to our employees is medical care. When an employee first comes to work, we make such tests, for our own records.

"Is it lawful for us to make these tests as pre-marital tests, and make the required certification, when the person involved is our employee, if such persons expect to remain in our employ, after being married; if such person does not expect to remain in our employment. Have we the right to make these tests and can we certify to them, under this new law?"

Section 3364A, Laws of Missouri, 1943, provides in part as follows:

"Laboratory tests shall be made free of charge by the Laboratory of the State Board of Health, or by such other public health laboratories wherever maintained in the State of Missouri, upon the request of a physician or by an applicant.

"For the purpose of this act, 'laboratory' shall mean any private or public health laboratory duly approved by the State Board of Health of Missouri, or by the State Board of Health of any other state of the United States, or by the United States Public Health Service."

It will be noted that the report of the blood test is acceptable only when made by laboratories duly approved by the State Board of Health of this state or any other state of the United States, or by the United States Public Health Service. In accordance with our telephone conversation of this date, it is our understanding that whatever laboratory facilities you have are not approved by any of these boards. Since your laboratories are not so approved, you should make no blood tests under the pre-marital law.

CONCLUSION

It is our opinion that the board of managers should not allow laboratories of the State Eleemosynary Institutions to make blood tests for the purposes specified in section 3364A.

Respectfully submitted,

RALPH C. LASHLY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RCL:ML

TREASURER: Treasurer may be reimbursed for necessary
COUNTY COURT: clerical hire.

February 8, 1944.



Mr. Louis G. Johnson,
Presiding Judge
St. Francois County Court,
Farmington, Missouri.

Dear Sir:

Your letter of January 27, 1944, presents for our opinion the following question:

May the County Court reimburse the County Treasurer for \$1215.00 expended by him for clerical hire in the discharge of the duties of his office?

It appears that this sum has actually been expended by the Treasurer, and you state that such expenditure was "indispensable to conduct the duties of said office." We assume that you consider the sum to be reasonable.

The office of Treasurer in St. Francois County is governed by the provisions of Article 8, Chapter 100, R.S.Mo. 1939. Examination of that article does not disclose that the Treasurer of said county is authorized to employ a clerical force at the expense of the county. Nor do we find any other statute so providing. However, it does appear that Section 13800, Laws 1941, p. 534, authorizes Treasurers in counties having more than 75,000 and not more than 120,000 inhabitants to employ one deputy at a fixed salary.

We think the conclusion to be reached is governed by *Rinehart v. Howell County*, 153 S.W.(2d) 381 (Mo. Sup.). In that case the county prosecuting attorney had expended certain sums for necessary stenographic services connected with the discharge of his duties. The county refused to reimburse him and he brought action to compel reimbursement. The court held he was entitled to recover. The opinion points out how the prosecutor was not authorized by statute to have a stenographer, and how in larger counties prosecutors were authorized by statute to have a stenographer, and then disposes of the question as follows (l.c. 383):

"Appellant's statutory citations (authorizing stenographers in larger counties) constitute legislative recognition of the propriety of expenditures for stenographic services in the discharge of the present-day duties of prosecuting attorneys in the communities affected - an approved advance in proper instances for the administration of the laws by county officials and the business affairs of the county and for the general welfare of the public. Such enactments, in view of the constitutional grant to county courts, (Art. 6, Sec. 36) should be construed as relieving the county courts in the specified communities from determining the necessity therefor and, by way of a negative pregnant, as recognizing the right of county courts to provide stenographic services to prosecuting attorneys in other counties when and if indispensable to the transaction of the business of the county, and not as favoring the citizens of the larger communities to the absolute exclusion of the citizens of the smaller communities in the prosecuting attorney's protection of the interests of the state, the county and the public. See the reasoning in *Ewing v. Vernon County*, 216 Mo. loc. cit. 693, 116 S.W. loc. cit. 522. Consult *Harkreader v. Vernon County*, 216 Mo. 696, 116 S.W. 523, involving reimbursement to a sheriff of expenditures for water, gas, janitor service and stamps. *Buchanan v. Ralls County*, 283 Mo. 10, 222 S.W. 1002. Additional reasons sustaining the judgment nisi may be found in the cases cited.

"The foregoing disposes of the points briefed by the appellant. The result might differ under five issues involving the County Budget Law, lawful action by the General Assembly covering the subject matter in said county, nonarbitrary action by the County Court, or the substantialness of the testimony as to the absolute necessity for the services."

As applied to the instant question, it appears that, just as in the Rinehart case, the Treasurer of St. Francois County does not have a statute authorizing him to have clerical help, but that in larger counties the Treasurers are, by statute, provided with help. The same line of reasoning employed in that case ought to apply to warrant reimbursement of the Treasurer of St. Francois County for all reasonable sums expended by him for clerical hire "when and if indispensable to the transaction of the business of the county."

CONCLUSION.

Therefore, subject to the same reservations made by the court in the Rinehart case, we are of the opinion that the Treasurer of St. Francois County may be reimbursed in a reasonable sum for expenditures made for clerical hire necessary and indispensable to the transaction of the duties of his office.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General.

APPROVED:

ROY McKITTERICK
Attorney-General.

LLB/LD

ELEEMOSYNARY INSTITUTIONS: Leases on a crop-rent basis may be made for a period in excess of two years.

February 9, 1944



Hon. Ira A. Jones, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jones:

We are in receipt of your letter of February 1, 1944, in which you request an opinion of this department. Your opinion request reads as follows:

"We would like to have an opinion from you on farm leases. We have one opinion stating that if cash rent is paid we cannot lease for over a biennium.

"Some time ago we submitted some leases to your department which ran for a period of years, but they were on a crop rent basis, no cash being involved. At that time whoever looked at the leases said they were valid, but we do not seem to be able to locate a written opinion from your office covering this matter.

"We ask this specific question: If a lease is made on a farm by the Board of Managers of the Eleemosynary Institutions on a crop rent basis, may we make said lease for more than a biennium, say for three or five years?"

No lease accompanied the above request so it will not be possible to rule on any specific lease but only to treat the question in general terms.

Section 9265, R. S. Mo. 1939, provides:

"If the curators, managers, trustees or other officers having control of any educational, eleemosynary or other public institutions belonging to the state, or any executive committee, by whatever name called, having subordinate control under such curators, managers, trustees or other officers, as aforesaid, or any president, superintendent, steward, or other officer in immediate charge of any such institution, or any person having the business management of any such institution, shall contract, in the name or for the use of such institution, any debt for which there shall not be at the time an adequate appropriation, every such curator, manager, trustee or other officer in control, as aforesaid, and every such committeeman, and every such president, superintendent, steward or other officer in immediate charge, as aforesaid, and any person having the business management of any such institution as aforesaid, shall be personally liable for such debt to the person with whom such is contracted, or the assignee thereof, and, in addition, shall, on conviction, be deemed guilty of a misdemeanor: Provided, that no such curator, manager, trustee or officer in control or committeeman, as aforesaid, shall be so liable, as aforesaid, or be deemed guilty, as aforesaid, if at the time of incurring such debt he shall require the ayes and noes to be taken and recorded on the question of incurring such debt, and shall himself vote against incurring such debt: Provided further, that nothing herein shall prohibit such managers of any such institutions from incurring debts for the necessary support of such institutions from January first of the years the general assembly meets, until the appropriations for such institutions are made, when the funds of such institutions are exhausted."

Your attention is directed to page 2 of an opinion sent to you by this department under date of February 24, 1942, which reads as follows:

"No debt can be contracted, under the above section 'for which there shall not be at the time an adequate appropriation.' It is well settled in this State that an appropriation is for only two years. Article X, Section 19, Constitution of Missouri."

If a certain share of crops produced on lands described in a lease is the sole consideration for the lease and no money rent is to be paid, then the question is whether this payment would constitute a "debt." It will be noted here that unless the rent is paid in money the restriction as to an adequate appropriation is not involved in this question.

In the case of Lowery v. Fuller, 221 M. A. 495, 281 S. W. 968, 1. c. 972, it is said:

"It is the rule that a sum payable upon a contingency is not a debt, which is an unconditional promise to pay a fixed sum at a specified time and does not become a debt within the meaning of the law until the contingency has happened. The words "debt" and "indebtedness" are not synonymous with the word "liability." Saleno v. Neosho, 30 S. W. 190, 127 Mo. 627, 27 L.R.A. 789, 48 Am. St. Rep. 653."

And again, in the case of Gilman v. Commissioner of Internal Revenue, 53 Fed. (2d) 47, 1. c. 50:

"A debt is 'that which is due from one person to another, whether money, goods or services; that which one person is bound to pay to another, or perform for his benefit. Webster's New International Dictionary. 'In order to create indebtedness there must be an actual liability at the time, either to pay then, or at

some future time.' Bouv. Law Dict. Vol. 2, page 1531. 'Every debt must be solvendum in praesenti or solvendum futuro--must be certain and in all evidence payable; whenever it is uncertain whether anything will ever be demandable by virtue of the contract, it cannot be called a "debt." While the sum of money may be payable upon a contingency, yet in such case it becomes a debt only when the contingency has happened, the term "debt" being opposed to "liability" when used in the sense of an inchoate or contingent debt.' 17 C. J. 1377; Emil Weitzner v. Commissioner, 12 B. T. A. 724; Salerno v. City of Neosho, 127 Mo. 627, 30 S. W. 190, 27 L. R. A. 769, 48 Am. St. Rep. 653; Lowery v. Fuller, 221 M. A. 495, 281 S. W. 968; Clinton Mining & Mineral Co., v. Beacom (D. C.), 264 Fed. 228; Balden v. Jensen (D. C.), 69 Fed. 745."

There is no certainty that any crop will be growing owing to circumstances beyond the control of the lessee, in which event, there would be no payment to the lessor and no consequent liability on the part of the Board of Managers. We do not believe that a debt is created by such a lease as is referred to in Section 9265, supra.

Conclusion

It is the opinion of this department that the Board of Managers of the State Eleemosynary Institutions may authorize the execution of leases on a crop-rent basis for more than a biennium.

Respectfully submitted,

RALPH C. LASHLY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

RCL:EG

ASSESSORS: Not entitled to compensation for assessing non-taxable property.

April 19, 1944.

Mr. John R. Johnson,
Assistant Prosecuting Attorney
Reynolds County,
Centerville, Missouri.



Dear Sir:

In your letter of January 31, 1944, it is stated the audit of the Assessor for the years 1937 to May 31, 1941, inclusive has resulted in that officer being charged with a shortage of \$133.24. The auditor's explanation of this charge is:

"\$130.54 for making and entering lists and tracts of land. In several cases Mr. Brown (the assessor) charged for lists on real estate and personal property belonging to the same person and for each entry in sections where one person's name appeared twice in the same section; also for entries on non-taxable property.

"\$2.70 represents charges of mileage for services on board of equalization."

It appears from your letter that the shortage charge arising from "entries on non-taxable property" was the assessment of Government land again where it was shown on the previous year's books, having in the interim been acquired by the Government and become non-taxable.

You desire our opinion on the correctness of the shortage charge arising from the assessment of the non-taxable property.

Section 10950 R. S. Mo. 1939, in prescribing the duties of the assessor provides:

"The assessor or his deputy or deputies shall between the first days of June and January, and after being furnished with the necessary books and blanks by the county clerk at the expense of the county, proceed to take a list of the taxable personal property and real estate in his county, town or district, and

assess the value thereof, in the manner following to-wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise which may be required to pay a license tax, being in any county of this state in accordance with the provisions of this chapter, and the person listing the property shall enter a true and correct statement of such property, in a printed or written blank prepared for that purpose;* * *".

This section then goes on and enumerates what the lists shall contain and concludes with:

"* * and every other species of property not exempt by law from taxation."

It is, therefore, very clear that the assessor is not to assess or take lists of property that is non-taxable. Further bearing this out is other provisions of the law. Section 10966 R. S. Mo., 1939, makes provision for obtaining maps and plats for the assessor's use in assessing real estate, and Section 10968 R. S. Mo., 1939, provides that:

"The assessor shall have free access to said maps during the time of assessment with a view to ascertain what lands are taxable;* *".

Again Section 10969 R. S. Mo. 1939, provides:

"The assessor, on examination and comparison of the list of property delivered by individuals, and the list of lands furnished by the secretary of state, and said maps and plats, and after diligent efforts for ascertaining all taxable property in his county, shall make a complete list of all the taxable property in his county, to be called the assessor's book."

Mr. John R. Johnson,

-3-

4-19-44.

From the last section quoted, it is to be seen that only the taxable property is listed in the assessor's book, for the making up of which the assessor is compensated under Section 10971, R. S. Mo. 1939.

CONCLUSION.

It, therefore, is our opinion that an assessor is not entitled to receive any compensation for taking or making on his own view a list on non-taxable property, nor is he entitled to compensation for entering the same in the assessor's book.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney-General

LLB/LD

County Court: School fund mortgages. Rate of interest.
Reduction of interest before termination
of contract.

June 13, 1944

4/17



Honorable Waldo P. Johnson
Assistant Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Mr. Johnson:

This is an acknowledgment of your letter addressed to the General on June 10, 1944, relating to a question of the rate of interest to be charged and collected on school fund mortgages. Your inquiry is as follows:

"I am directed by the County Court to ask your opinion as to whether the rate of interest to be collected on loans of the County School Fund and of the Township School Funds then existing is affected by an order of the Court providing that on loans made thereafter the rate of interest should be at a lower rate.

"Specifically, the County Court on May 22, 1944 made an order providing that loans should thereafter be made at 4% interest. All loans then outstanding bore 6% interest. Certain borrowers contend that the County Court is without authority to reduce the rate of interest on new loans without reducing the rate on loans then outstanding. All loans are due according to their terms on December 31st of the year in which made and, without formal extension, are permitted to run from year to year upon payment of interest as long as the security is considered satisfactory. In practice payment of loans has always been accepted at any time with interest to date of payment only.

"The question also presents itself as to whether the County Court has authority, if it so desires, to reduce the rate of interest on outstanding loans below the contract rate."

Section 10376, Laws of Mo. 1943, is as follows:

"It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than three per cent per annum on unencumbered real estate security, worth at all times at least double the sum loaned, with personal security in addition thereto, the proceeds of all moneys, stocks, bonds, and other property belonging to the county school fund; also, the net proceeds from the sale of estrays; also, the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of this state shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund, the income of which fund shall be collected annually and faithfully appropriated for establishing and maintaining free public schools in the several counties of this state." (Underscoring ours.)

Section 10383, R. S. Mo. 1939, is as follows:

"Whenever there shall be in the county treasury any money belonging to the capital of the school fund of any township therein, the county court of such county shall loan the same for the highest interest that can be obtained, not exceeding eight nor less than four per cent per annum, upon conditions and subject to the restrictions hereinafter set forth." (Underscoring ours.)

Section 10384 thereof provides in part as follows:

"* * *In all cases of loan, the bond shall be to the county, for the use of the township to which the funds belong, and shall specify the time when the principal is payable, rate of interest and the time when payable; that in default of payment of the interest, annually,

or failure by principal in the bond to give additional security when thereto lawfully required, both the principal and interest shall become due and payable forthwith, and that all interest not punctually paid shall bear interest at the same rate of interest as the principal.* * *" (Underscoring ours.)

The above section was amended by the Laws of Mo. 1943, in S. B. 13, p. 880-1, which is in part as follows:

"* * *In all cases of loan, the bond shall be to the county, for the use of the township to which the funds belong, and each loan shall be made for not more than five years, and the bonds shall specify when the principal is payable and the rate of interest to be paid thereon; that the interest shall be paid annually and in default of payment of the interest annually, or failure by the principal in the bond to give additional security at any time during the existence of said loan when thereto lawfully required by the county court, both the principal and interest shall become due and payable forthwith and the county court may proceed to cause the real estate securing payment of the loan to be sold as hereafter provided. The said bond shall provide that if the interest is not punctually paid, it shall become as principal and bear the same rate of interest.* * *" (Underscoring ours.)

Section 46, Art. IV, Constitution of Mo, is as follows:

"The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, That this shall not be so construed as to prevent the grant of aid in a case of public calamity."

In defining the powers and duties of the County Court in administering a county public school fund the Supreme Court

in the Case of Saline County v. Thorp, 88 S. W. 2d. 183, 186 held:

"* * * It must be remembered that this is a case where public officers were acting for a governmental subdivision of the state, a county, in relation to funds held in trust for the public for school purposes. Nothing is better settled than that, under such circumstances, such officers are not acting as they would as individuals with their own property, but as special trustees with every limited authority, and that every one dealing with them must take notice of those limitations, Montgomery County v. Auchley, 103 Mo. 492, 15 S. W. 626,

"Sections 9243-9256, R.S. 1929 (Mo. St. Ann. Sections 9243 to 9256, pp. 7098-7104), say what a county court can do with reference to the investment, collection, and reinvestment of public school funds. These statutes require that county courts 'diligently collect, preserve and securely invest * * * on unencumbered real estate security, worth at all times at least double the sum loaned * * * the county school fund'; and that these funds 'shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund, the income of which fund shall be collected annually and faithfully appropriated for establishing and maintaining free public schools.' Section 9243 (Mo. St. Ann. Section 9243, p. 7098). It is also provided by this section that the county court 'may, in its discretion, require personal security in addition thereto.' The county treasurer is required to collect all school money, give receipts therefor, and file duplicate receipts with the county clerk. The county clerk is authorized to satisfy a school fund mortgage 'when the amount of said receipts is in full of all interest and principal of said bond and mortgage.' * * *

"The purpose of requiring a bond and personal security is, of course, to make it possible to collect the debt even if the land, securing the loan, decreases in value. The county court has no authority to give any right of the county to collect either principal or interest due (Veal v. Chariton County Court, 15 Mo. 412), or to dispense with either the bond, with its personal obligation to repay the money, or the mortgage conveying clear land as security. Lafayette County v. Hixon, 69 Mo. 581. Neither does it have authority to release a surety from his liability upon the bond or to take in payment of the amount due or any part thereof, upon a school fund bond and mortgage, a note which does not conform to the statutory requirements. Montgomery County v. Auchley, 103 Mo. 492, 15 S.W. 626. Why should it have any authority to release one who borrowed from this fund from his obligation to repay it? * * *"

Each loan is an individual contract between the county court as trustees for the fund and the borrower. Such court does not act in the capacity of a court but as statutory trustees. This being true, a general court order should not be made fixing an arbitrary rate of interest on all loans. Therefore, such trustees in making each loan should execute their trust by loaning for the highest rate of interest that can be obtained, "not exceeding eight nor less than four per cent per annum".

CONCLUSION

Therefore, it is the opinion of this department that the members of the county court acting as trustees in making loans out of the funds provided in Sections 10376 and 10383 supra must loan such funds for the highest rate of interest that can be obtained in each loan within statutory limits. A loan made for a definite time and rate of interest, as provided by statute, must, by such trustees, be strictly enforced according to the terms of the mortgage and bond. A reduction of interest by such trustees on such executed contract before its termination would constitute a grant of public money and violate the

Hon. Waldo P. Johnson

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June 13, 1944

provision of Section 46, Art. IV of the Constitution of
Missouri.

Respectfully submitted,

SVM:EH

S. V. MEDLING
Assistant Attorney General

APPROVED

ROY MCKITTRICK
Attorney General

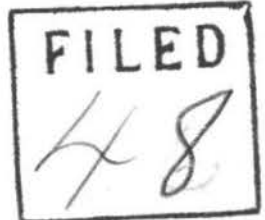
Township Collectors:

OFFICERS:

Township collector may appoint deputy to perform ministerial duties, "Abandonment" of office is question of fact, failure to personally perform duties must be decided by ouster suit.

August 18, 1944

Honorable H. A. Kelso
Prosecuting Attorney
Nevada, Missouri



Dear Mr. Kelso:

This will acknowledge the receipt of your letter of August 3, 1944, requesting an opinion of this office, omitting caption, which is as follows:

"In my official capacity as Assistant Prosecuting Attorney of Vernon County, Missouri, I would like an opinion from your office on the following set of facts:

"In Vernon County, Missouri, a county under township organization, the township collector of one township is unable to perform the duties of his office and desires to appoint a deputy to act in his behalf. I am unable to find any authority for him to do this.

"Will you please advise whether or not in your opinion there can be a deputy collector appointed?"

Your letter of August 15, contained the following question.

"One further question-- If the collector is to be away from now on till the end of his term of office is the office vacated."

I.

There is no specific statutory authority invested in a township collector to appoint a deputy in this state.

It may be stated as a general rule however, that where the acts to be performed are ministerial in their nature, they may be performed by deputy. Thus in Mechem on Public Officers, Sec. 568, it is stated:

"Where however, the question arises in regard to an act which is of a purely mechanical, ministerial, or executive nature, a different rule applies. It can ordinarily make no difference to any one by whom the mere physical act is performed when its performance has been guided by the judgment or discretion of the person chosen. The rule therefore, is that the performance of duties of this nature may, unless expressly prohibited, be properly delegated to another."

In *Small v. Field*, 102 Mo., 104, the court stated:

"* * * But at common law a ministerial officer had authority to appoint a deputy. * * * thus, a sheriff, though his patent of office does not say he may execute his office per se vel sufficientem deputatum suum, yet he may make a deputy. * * *

"The office of clerk of a court seems to be one which from its nature and constitution implies a power or right to execute it by deputy. Whenever nothing is required but superintendency in office a ministerial officer may make a deputy. * * * And the rule is general that a deputy may do every act which his principal might do. * * *"

The office of township collector would seem to be even more ministerial than that of a clerk of court or sheriff inasmuch as the collector merely collects the taxes assessed against the residents of his township and accounts for them. He has no discretion in either the amounts to be collected or to be accounted for. It would seem therefore that this office is ministerial in its nature and the collector may appoint a deputy. However, inasmuch as there is no specific statutory authorization for compensation for a deputy township collector, he could not be paid from the public treasury. As is stated in 43 Am. Jur. 222 Sec. 465: "* * * Deputies appointed by a public official cannot be paid from the public treasury in the absence of express statutory authority for such payment."

II.

You also want to know whether the fact that your township collector is absent from the district, and may not return until the end of his term, creates a vacancy in the office. Of course, an office may become vacant ipso facto by abandonment, but in order to constitute an abandonment of office, the abandonment must be total and under such circumstances as to clearly indicate an absolute relinquishment. Moreover, the officer should manifest a clear intention to abandon the office and its duties, although his intention may be inferred from conduct, 43 Am. Jur. Sec. 173. Whether your township collector has abandoned his office here by leaving his district is a question of fact which would have to be determined by proper court action. The mere leaving of the district would not in itself constitute an abandonment.

Of course, while the collector of the township is out of the district he will not be personally performing the duties of his office.

Section 18 of Art. 11 of the Missouri Constitution requires that no person shall hold any state office without personally devoting his time to the performance of the duties to the same belonging.

Section 12828 R1 S. Mo., 1939, provides:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or wilfully fail to refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office and may be removed therefrom in the manner hereinafter provided."

Hon, H. A. Kelso

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Aug. 18, 1944

It has been held however, that neither the constitutional provision or the statute in themselves create a vacancy but that they must be determined by an ouster suit. In State v. Wilson, 166 S. W. (2d) 499, the court stated: "Unless an office is abandoned or relinquished an officer is entitled to a trial on the charge of failing to personally devote his time to the performance of his duties. Such failure may be excusable." Of course, should your collector be in military service the Civil Relief Act would probably prevent any ouster suit at this time.

CONCLUSION.

It is therefore, the opinion of this office that a township collector has a common law right to appoint a deputy to perform ministerial duties. Collector's absence from district is not in itself an abandonment but this is a question of fact to be determined by the courts. A charge of failing to personally perform the duties of an office must be decided by an ouster suit.

Respectfully submitted

ROBERT J. FLANAGAN
Assistant Attorney General

APPROVED;

ROY McKITTRICK
Attorney General

RJF:LeC

TOWNSHIPS: Debts in excess of anticipated revenue are invalid.

August 31, 1944.

9-1



Mr. H. A. Kelso,
Prosecuting Attorney
Vernon County,
Nevada, Missouri.

Dear Sir:

Your letter of August 3, 1944, is as follows:

"In my official capacity as assistant prosecuting attorney of Vernon County, Missouri I would like your opinion on the following set of facts:

"Vernon County, Missouri is under township organization. In November of this year a vote will be taken to determine whether or not it shall so remain or whether it shall change over to county organization.

"In one of our townships some several years ago they, the township board, purchased farm road grading equipment far in excess of its anticipated revenue. This debt has never been paid and is at present something over \$3000.00. A local attorney has advised the board that in the event that this county adopted county organization neither the township nor the county could be held for this debt and that the members of the township board would be personally and individually liable for this debt.

"My questions concerning this matter then are as I have outlined as follows:

- "1. Is the debt a valid debt against the township?
- "2. If this county should adopt township organization would the county be liable for this debt (assuming that it is a valid debt)?
- "3. If the debt is not a valid debt against the township or county would the township board or the members thereof be liable and if so would it be the members who contracted the debt or would it be the present board members?"

Section 12, Article 10 of the Constitution provides:

"No county, city, town, township, school district or other political corporation or subdivision of the state shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year,***."

In your letter you state that the debt for road machinery was, at the time contracted for, in excess of the township's anticipated revenue for that year. With that statement nothing remains for us to pass upon, since the above constitutional provision clearly prohibits a township from becoming so indebted. Invariably the courts have held such debts void. Many cases so holding will be found in the annotations to Section 12, Article 10, Mo. R.S.A., and see the late case of Missouri Toncan Culvert Co. v. Butler Co., 181 S.W. (2d), 506 (Mo. Sup.).

This view renders it unnecessary to consider your second question, and as to the third question we can only say that it is not our function to determine the respective rights and liabilities of the machinery company or of the present or past members of the township board. However, some idea of the court's views of this subject may be gained from Jacquemin and Shenker v. Andrews, 40 Mo. App. 507, and the annotation appearing in 87 A.L.R. 273.

CONCLUSION.

It is our opinion that debts of a township, contracted in excess of the anticipated revenue for that year, are void and the township is not liable for their payment.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney-General

LLB/LD

GAMING.

: Bingo is prohibited even if proceeds
: go to charity lottery.
:

November 22, 1944

Mr. H. A. Kelso
Assistant Prosecuting Attorney
Vernon County
Nevada, Missouri

11/25
FILE

48

Dear Sir:

Your letter of September 15, 1944 is as follows:

"I have been requested by the local chapter of the Veterans of Foreign Wars to write for an opinion on the following set of facts:

"The V. F. W. proposes to open a game commonly called 'bingo' in an empty store building located at Nevada, Missouri. This game is one of chance the players paying a fee to engage as a player and the winner being determined by whether or not the player holds a card with a certain sequence of numbers on it. The winner would receive a prize offered by the operator of the game.

"Would the fact that the profits of the game are to go to charity, after deducting the costs of operation, prevent this from being a lottery within our statutes?

"Would the offering of war bonds and stamps as prizes make this game any less a lottery?"

Section 4704, R. S. Mo., 1939 prohibits the establishment of lotteries in this state. In State ex inf. McKittrick v. Globe-Democrat Publishing Co., 110 S. W. (2d) 705, 713, is said that the statute "includes every scheme or device whereby anything of value is for a consideration allotted by chance."

As we understand the game "Bingo", the players pay a certain sum for a card on which is printed certain numbers, each column of numbers headed by a letter of the alphabet. The operator of the game then draws from a container cards or wooden blocks bearing numbers and letters and announces to the players, for example, that the number drawn is "50 under G." The

Nov. 22, 1944

player then covers that number if it appears on his card. When a complete row of numbers on a card are covered, the player doing so first wins a prize.

This type of game clearly falls within the statute for it awards a thing of value (the prize) for a consideration (the charge for the card) allotted by chance (the probability that numbers will be called out corresponding to those appearing on the cards).

The fact that the proceeds of such enterprise are to go to charity and prizes are to consist of war stamps--no matter how laudable the purpose-- does not alter the terms of the statute. It makes no exceptions for charity and clearly war stamps are a "thing of value". In New York in *People v. Keifer*, 16 N.Y.S. (2d) 858, 173 Misc. 300, the proposition that because the proceeds were to go to charity, the scheme was legal, was expressly rejected.

CONCLUSION.

Therefore, it is our opinion that the game of "Bingo" is a lottery; that the facts that the prizes given consist of war stamps and the proceeds are to go to charity does not legalize the game.

Respectfully submitted

APPROVED:

LAWRENCE L. BRADLEY
Assistant Attorney General

VANE C. THURLO
Acting Attorney General

LLB:LeC

COUNTY COURT: County Court cannot divert to the
BONDED INDEBTEDNESS: County Revenue Fund money collected
to pay off bonded indebtedness.
TAXATION:

February 3, 1944

28
Honorable J. E. Killion
Presiding Judge
County Court of Texas County
Houston, Missouri



Dear Sir:

We have for attention a letter from Mr. C. W. Burkhead, a member of the Constitutional Convention, in which he requests the opinion of this department and directs us to send the opinion to the County Court of Texas County. His request is as follows:

"The County Court of Texas County wishes to know if the Court may use money accrued on Refunding and Court House and Jail Bonds by issuing a warrant on the county in order to save the interest on county warrants.

"The sum of \$15,000 is now on hand and will not be needed until the first of the year at which time money will be on hand from the current tax collections.

"Will you please send an opinion on this to the County Court of Texas County, at Houston, Missouri?"

The question is, as we understand it, whether the County Court of Texas County may use the \$15,000 (which it has on hand at the present time in the Courthouse and Jail Bond Fund) to pay the current expenses of the county, and then repay this amount into the Courthouse and Jail Bond Fund the first of next year from the current tax collections.

We assume that the County of Texas has voted Courthouse and Jail Bonds and that the \$15,000 above mentioned was derived from an annual tax levied by the County Court to pay the interest and create a sinking fund for the payment of said obligation under the provisions of Article 5, Chapter 16, R. S. Mo. 1939.

There is a general rule of law which we think is applicable to this question and that is that taxes authorized to be levied and collected for one purpose cannot be diverted or used for some other purpose.

Under the title of "Taxation" in 61 C. J. page 1521, Section 2235, it is stated as follows:

"Taxes which are set apart by the constitution of the state for particular uses cannot be diverted by the legislature to any other purpose, and neither can funds derived from taxes levied and collected for particular purposes be legally utilized for, or diverted to, any other purpose. * * * * *

This rule of law is supported by cases from various states and we quote from Dew vs. Ashley County, (Ark.) 133 S. W. (2d) 652, 1. c. 653:

"* * * Perhaps there is no better settled principle of law than the one providing that the effect that taxes levied and collected for a particular purpose may not be diverted or appropriated to some other purpose. * * *"

And also, in School District No. 24 vs. Smith, 191 Pac. 506, 1. c. 510, the court stated:

"Although the county court is authorized and directed by the Legislature to make such a levy for school purposes, when made it is for the sole use and benefit of the various school districts of the county. The authority of the county court then ceases. When

the tax is collected it automatically becomes the money of the school districts according to their proportionate rights, and thereafter the county court has no interest whatever in the fund. * * * * *

In the case of State ex rel. Hopper, vs. Cottengin, 172 Mo. 129, 1. c. 135, in discussing the question of the county using money voted for a bonded indebtedness for ordinary county purposes, the court said:

"* * * The fund in question was no part of the general revenue fund of the county. It was a special fund raised for a particular purpose, and neither the county court nor the county treasurer had any right to apply a dollar of it to any other purpose. If, on the one hand, the bonds are valid, and the taxes were legally levied, the bondholders are entitled to it. * * * * *"

The same principle is involved as when taxes which are levied for school purposes cannot be used, when collected, for county purposes. Neither can taxes levied for county purposes be used for school purposes. The authority of the County Court ceases with the making of the levy, and the money, when collected, becomes automatically the money of the school districts.

It is clear that the County Court, in the instant case, would not have authority to issue a warrant payable out of the interest and sinking fund and payable into the county revenue, for the ordinary county expenses, and then repay the interest and sinking fund from the current taxes on January 1, 1945, for the reason that the fund cannot be used for any other use than the payment of the bonded indebtedness and interest thereon.

CONCLUSION

It is, therefore, the opinion of this department that the County Court of Texas County would not be authorized to use the

money collected to pay the bonded indebtedness for county purposes, on an agreement to pay same back into the interest and sinking fund at a later date.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

CRM:CP

MARRIAGE LICENSES: Duty of recorder of deeds to record returns of marriage licenses.

May 15, 1944



Mrs. Ruby Koelling
Recorder of Deeds
City of St. Louis
St. Louis, Missouri

Dear Mrs. Koelling:

Your letter of May 10, 1944, has been received. Your letter states:

"I have had numerous occasions during the year 1943 where marriage licenses have been returned showing that marriages have been performed in other states than Missouri. It is my understanding our licenses are not good in any other state.

"Will you please advise me as to the procedure I shall take in this instance.

"Also since the beginning of 1944 the new law makes marriage licenses void after they have been issued 10 days and we are receiving returns showing that marriages have been performed using licenses over 10 days old.

"Please advise me as to the proper procedure."

It is understood that your inquiry as to your procedure in both instances refers to your duties with respect to recording the returns on such marriage licenses issued by you. This opinion, therefore, will be addressed to the requirements of our statutes respecting your duty to record such returns.

Section 3364, Article 1, Chapter 20, R. S. Missouri, 1939, was repealed by the General Assembly in 1943 and was reenacted with certain changes therein, and accompanied by four new sections, known as Sections 3364-A, 3364-B, 3364-C and 3364-D, at

pages 639 to 643 of the Session Acts of 1943.

Section 3364, as it stood prior to the legislative change in 1943, provided for the issuance of a marriage license by recorders of deeds of this state, including the city of St. Louis, forthwith upon application therefor. Section 3364, as enacted by the Legislature in 1943, provided as the only change from that section as it stood before that the applicants for a marriage license shall apply for the license three days before the date of the issuance of the license, that the application be presented to the recorder of deeds, and that upon the expiration of three days after the receipt of the application the recorder of deeds shall issue the license, unless one of the parties withdraws such application.

The new sections numbered 3364-A, 3364-B, 3364-C and 3364-D are sections providing for laboratory health tests to be supplied, with certain affidavits by the applicants for a marriage license to be made fifteen days before the issuance of the license, and with the provision that a license when issued shall be void after ten days from the date of issuance, a penalty being prescribed for violation of some of the provisions of these sections by some of the persons named therein, and with the final provision in Section 3364-C to the effect that the validity of any marriage under the Act shall not be impaired by violation of any of the provisions of any or all of these Sections 3364-A, 3364-B and 3364-C if the parties to the marriage are otherwise qualified for marriage. Otherwise, the provisions of Chapter 20, R. S. Missouri, 1939, respecting the duties of recorders of deeds of the State of Missouri, including the city of St. Louis, are not changed but remain as they appear in the revision of our Statutes of 1939.

Section 3365, R. S. Missouri, 1939, provides that the recorders of the several counties of this state, and the recorder of the city of St. Louis, shall, when applied to by any person legally entitled to a marriage license, issue the same, and sets out the form of the license. The said section provides that within ninety days after the issuance of the license the person solemnizing the marriage shall make a return showing the place and the time he solemnized the marriage for the parties named in the license.

The statutes of this state have apparently always provided a ninety day period for the person solemnizing a marriage

contract in which to make the return of the license showing the solemnization of the marriage.

In the Revised Statutes of 1879, Section 3270 thereof provided that returns of marriage licenses should be made to the recorder of the county where the marriage ceremony was performed. In 1889 the Legislature repealed Section 3270 and enacted a new section known as Section 6850, R. S. Missouri, 1889, providing that the return should be made to the recorder issuing the license. This is still the law of this state, as contained in Section 3365, R. S. Missouri, 1939.

Section 3367, R. S. Missouri, 1939, provides a penalty against any recorder who wilfully neglects or refuses to issue or record a marriage license with the return thereon.

These sections were before the Kansas City Court of Appeals in the case of State ex rel. Stephens v. Moore, Recorder, 96 Mo. App. 431. The opinion recites the terms of the statutes existing at the time, including those of the then Section 4319, now Section 3368, R. S. Missouri, 1939, which require that the recorder of deeds of each county shall certify to the grand jury at each regular term of the court having criminal jurisdiction within the county a list of all marriage licenses issued by him and which have not been returned to him by the person who shall have solemnized the marriage under said license within ninety days after the issuance thereof, and further showing the penalty prescribed. This statute is now mandatory, as it was at the time of the Court of Appeals opinion referred to.

The court discusses very clearly the whole scheme and purpose of the marriage license statutes. The court issued its permanent writ of mandamus against the Recorder of Cole County, Missouri, requiring him to record marriage licenses and the returns thereon. The court's opinion, l. c. 436-437, closed with this paragraph:

"Nor do we discover any insuperable difficulty in the way of recording the license when issued, and, later on, when the return is made, to record it. If it be true, as we have been informed, that there are well bound record books now made and in use by the recorders in some of the counties in which the blank form of license and return prescribed in section 4316 are printed in the same order

as therein, it would seem that a recorder provided with such a record book could without the least inconvenience record a license when issued by him, filling out a blank in his record of marriage licenses, and, later on, when the return is in, fill out the blank for it immediately following the record of the license, and thus complete the record of both instruments. Whether such printed record book for recording marriage licenses and the returns thereon are in use or not, it is easy to see that it is practicable to procure them, and in them to record, without inconvenience, all marriage licenses when issued, and the returns thereto when made.

"It results that the relator's motion for a peremptory writ must be sustained, and the writ ordered accordingly. All concur."

Our statutes do not prescribe any place for the solemnization of a marriage. Section 3363, R. S. Missouri, 1939, does provide:

"Marriages may be solemnized by any judge of a court of record or any justice of the peace, or any licensed or ordained preacher of the gospel, who is a citizen of the United States or who is a resident of and a pastor of any church in this state."

Thus it would seem to be presumed that a marriage should be solemnized within the jurisdiction of the State of Missouri under any marriage license issued in this state.

Under Section 3366, R. S. Missouri, 1939, it is mandatory that the recorders of this state shall record licenses, and then when the return is sent in, record the return also as made by the person who solemnized the marriage, as is required of such person in Section 3365, R. S. Missouri, 1939. It is not the duty nor the prerogative of recorders of deeds of this state to determine the validity or invalidity of a marriage performed in another state even though the return showing its performance discloses that the marriage was solemnized in consequence of the issuance of a license to the contracting parties by a recorder of deeds in the State of Missouri.

May 15, 1944

One of the primary purposes apparently running through all these statutes is to provide a list of marriage licenses issued and which have not been returned by persons solemnizing the marriages, to be given to the grand jury as a basis for criminal proceedings against persons who solemnize marriages and fail for more than ninety days to make the proper return.

It is, therefore, the opinion of this department that your office should proceed to record, under the terms of Section 3366, R. S. Missouri, 1939, all returns of licenses issued by you and sent to you by persons solemnizing marriages; that you should certify to the grand jury of the city of St. Louis, as required by and in conformity with the provisions of Section 3368, R. S. Missouri, 1939, a list of all marriage licenses issued by you and which have not been returned to you by persons solemnizing marriages under such licenses within ninety days of the issuance thereof.

Taking up the last paragraph of your request for this opinion on the matter of your procedure where a return of the marriage licenses shows that marriages have been performed using licenses issued more than ten days prior to the solemnization of the marriage, it is the opinion of this department that your office should record such returns in like manner as you are hereinabove advised respecting marriage licenses returned showing the marriage to have been solemnized outside the State of Missouri. This, for the further reason that Section 3364-A, Session Acts of 1943, p. 642, states:

" * * * The laboratory report * * * shall be made not longer than fifteen (15) days before the date of the issuance of the license and said license shall be void after ten (10) days from the date of issuance."

Section 3364-B provides penalties against the recorders of deeds, physicians and persons applying for a license for violations on the part of any of them of provisions named in said section, but it does not provide any penalty against persons obtaining a marriage license in case they do not use it until after ten days have elapsed from the date of its issuance. It would thus appear that that part of the statute is directory only.

Section 3364-C is as follows:

May 15, 1944

"If the parties to a marriage are otherwise qualified for marriage, the validity of any marriage under this Act shall not be impaired by any false statement contrary to the provisions of this Act or by the illegal communication of information concerning one or both of the parties to such marriage or by any other violations under Section 3364-A and Section 3364-B."

It is apparent from reading Section 3364-C that the validity of any marriage solemnized more than ten days after the date of the issuance of the license will not be impaired by the failure of the parties to utilize the license within the ten days. At most such a marriage would be only voidable, not void.

Authority for this position is contained in the case of State v. Eden, 350 Mo. 932, 169 S. W. (2d) 342. That was a case recently decided by our Supreme Court. The defendant, Eden, was convicted of bigamy. He defended on the ground that his first marriage was void. The defendant testified (without contradiction) that the license for his first marriage was issued by a justice of the peace and not by the recorder of deeds, and that his second marriage was lawful. The Supreme Court held his first marriage at most only voidable, and that a voidable marriage would support a conviction for bigamy. Judge Leedy, P. J., who wrote the opinion, said, l. c. 937 (Mo.):

" * * * As we construe the language of Sec. 3364, 'no marriage hereafter contracted shall be recognized as valid,' etc., it was not intended to render void ab initio a ceremonial marriage solemnized under the forms of, and in apparent compliance with, the marriage statutes, as in the case at bar. As to such marriage (even assuming the truth of defendant's testimony touching the circumstances under which he procured the license), it is our conclusion the language just quoted, when taken in connection with the further provision that 'no marriage shall be deemed or adjudged invalid' (for the reason therein specified) can, in no event, mean anything more than it shall not be recognized as valid on judg-

Mrs. Ruby Koelling

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May 15, 1944

ment, and certainly not that it is ipso facto and utterly void. In other words, the most that can be said of the defective issuance of the license, if such it was, is that it rendered the marriage merely voidable, and it was therefore to be treated as valid until declared void by competent authority; and a voidable marriage will support an indictment for bigamy.
* * *

The question of whether persons are otherwise qualified for marriage would be a matter of fact to be determined by the courts, and not by the recorders of deeds, as would also be the question of the validity of a marriage in another state.

Respectfully submitted

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

GWC:HR

NURSES' EXAMINATION: Statute does not require citizenship.

February 11, 1944



Miss Laura Layher, R. N.
Executive Secretary
State Board of Nurse Examiners
State Office Building
Jefferson City, Missouri

Dear Miss Layher:

Under date of February 11, 1944, you wrote this office requesting an opinion, as follows:

"Enclosed is a copy of a letter the Board of Nurse Examiners received from Willys R. Peek, Special Assistant in the Division of Cultural Relations, Washington, D. C.

"The Board desires an opinion on whether it is permissible in Missouri for a Chinese National to receive a degree in nursing, and to practice.

"Would alien students be permitted to complete their nursing course in this state? If so, would they be admitted as immigrant students?

"Your opinion will be appreciated."

The statute controlling the admission to examination for license to practice as a registered nurse in this state is Section 10034, R. S. Missouri, 1939, as follows:

"The Board shall admit to examination for license to practice as a nurse any applicant who shall pay a fee of ten dollars (\$10.00) and shall submit to the Board satisfactory written evidence, verified by oath, if required, that said applicant:

"1. Is twenty-one years of age;

"2. Is of good moral character;

"3. Is a graduate of an accredited high school or has the equivalent in units of high school work to the satisfaction of the board.

"4. Has since the year 1927 graduated from an accredited school of nursing giving a three-year course of instruction, (or has graduated previous to 1927 from an accredited school of nursing giving at least a two-year course of instruction), in which course of instruction the theory taught shall have been proportioned to practice in a hospital to the satisfaction of the board. An applicant failing to pass such examination shall be readmitted to examination within one year thereafter without the payment of an additional fee."

In considering a statute there are certain fundamental rules of statutory construction which must be borne in mind. The primary rule for construing a statute is to ascertain the lawmakers' intent and give the language honestly and faithfully its plain and rational meaning. *Cummins v. Kansas City Public Service Co.*, 66 S. W. (2d) 920, 334 Mo. 672. Another rule is that where statutory language is plain, the court should not read into the enactment words not found therein by express inclusion or fair implication. *Elsas v. Montgomery Elevator Co.*, 50 S. W. (2d) 130, 330 Mo. 596. Another rule is that where language of a statute is plain

and admits of but one meaning, there is no room for construction. Cummins v. Kansas City Public Service Co., 66 S. W. (2d) 920, 334 Mo. 672.

There is nothing in Section 10034, herein set out, which would indicate the lawmakers had any intention of making citizenship or nationality a qualification for being admitted to examination for license to practice as a nurse.

CONCLUSION

It is the conclusion of the writer that there is nothing in the statutes of Missouri which would prevent a Chinese national from receiving a degree in nursing and a license to practice. However, it is desired to call to your attention that during the present war period there are a number of federal regulations concerning aliens, and all persons who are not citizens of this country are subject to those regulations.

Respectfully submitted

W. O. JACKSON
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

WOJ:HR

CORPORATIONS: Attorney for stockholder who is not an officer of the corporation cannot file affidavit for registration.

July 26, 1944.



Hon. Russell Maloney
Corporation Supervisor
Secretary of State's Office
Jefferson City, Missouri

Dear Mr. Maloney:

This is to acknowledge your request of July 24, 1944, for an official opinion, which is as follows:

"Attached hereto please find letter received from Mr. Walter L. Roos, Attorney at Law, 506 Olive Street, St. Louis, Missouri.

"I wish to have your opinion as to whether or not an annual registration report and anti-trust affidavit filed in accordance with Sections 114 to 119 inclusive as contained in the General & Business Corporation Act of Mo., pages 471 and 472 of the Laws of Missouri, 1943, may be executed by an attorney for one of the stockholders in order to keep the corporation in good standing.

"Your attention is directed to Section 119, of the above named Act and I am forwarding Mr. Roos's letter so that you may have the benefit of his contentions.

"Your early attention will be appreciated."

We have also noted the enclosure therein from an attorney and have carefully considered the arguments advanced by him.

Section 114, of the Corporation Act of 1943, found at page 471, Laws of Missouri, provides for an annual registration with the Secretary of State by every corporation.

Section 115, of the same act, at the same page, provides for an affidavit with reference to trust combination.

July 26, 1944.

Section 116 of the same act, at the same page, provides the fee for annual registrations.

Section 117 of the same act, at the same page, sets out the duties of the Secretary of State in issuing the certificates of registration and is in part as follows:

" * * * Provided, that certificates of registration shall not be issued to any corporation until it has complied with all the provisions of this Act. Transaction of business as, or the exercise of the functions of, a corporation without certificate of registration posted, as herein required, shall be prima facie evidence of a violation of this Act."

Section 118 of the same act, at page 472, Laws of Missouri, 1943, provides the penalty for failure to comply with the law and Section 119 of the same act on the same page is as follows:

"Registration and anti-trust affidavit shall be sworn to before whom. -- The registration and anti-trust affidavit in this Act required shall be sworn to before any officer having a seal authorized to administer oaths, by the president, a vice-president, the secretary or treasurer of such corporation. Whenever any corporation is in the hands of an assignee or receiver, it shall be the duty of such assignee or receiver, or one of them, if there be more than one, to register such corporation and otherwise comply with the requirements of this Act." (Underscoring ours)

The answer to this question is merely one of statutory construction and Section 119, supra, plainly provides the manner in which the affidavit shall be filed.

In the case of *Kean v. Strodman*, 18 S.W. (2d) 896, 1.c. 898, the court declared the rule to be as follows:

"The familiar maxim of 'expressio unius est exclusio alterius' may also be invoked, for the maxim is never more applicable than in the construction of statutes. *Whitehead v. Cape Henry Syndicate*, 105 Va. 463, 54 S. E. 306; *Hackett v. Asnden*, 56 Vt. 201, 206; *Matter of Attorney General*, 2 N.M. 49.

"Certainly where, as at bar, the statute (section 8702) limits the doing of a particular thing to a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done. This is the general rule as to the application of the maxim. Even more relevant under the facts in this case is the interpretation given to it by the Kansas City Court of Appeals in *Dougherty v. Excelsior Springs*, 110 Mo. App. 623, 626, 85 S.W. 112, 113, to this effect: 'That when special powers are conferred, or where a special method is prescribed for the exercise and execution of a power,' that exercise is 'within the provision of the maxim * * * and * * * forbids and renders nugatory the doing of the thing specified except in the particular way pointed out.'"

In the case of *Kroger Grocery & Baking Co. v. City of St. Louis, Missouri*, 106 S.W. (2d) 435, l.c. 439, this rule was further upheld in the following words:

"Summarizing the reasons under-lying *Kansas City v. J. I. Case T.M. Co.*, supra, on the instant issue, they are to the effect, in so far as material here, that said act of 1879 conferred a permissive, not mandatory, power upon certain municipalities to impose a graduated license upon merchants; but (considering the word 'may' in said clause authorizing a graduated license as equivalent to 'must' or 'shall' (*Id.*, 337 Mo. 913, loc. cit. 931 (8), 87 S.W. (2d) 195, loc. cit. 205 (15-17)), any attempt to exercise the authority there conferred to exact graduated license fees must be exercised in conformity with the authority delegated and graduated in proportion to the annual sales (*Id.*, 337 Mo. 913, loc. cit. 930 (7), 87 S.W. (2d) 195, loc. cit. 205 (13) (14), and authorities cited; *Keane v. Strodman* (Banc) 323 Mo. 161, 167 (11), 18 S.W. (2d) 896, 898 (II) (quoting *Dougherty v. Excelsior Springs*, 110 Mo. App. 623, 626, 85 S.W. 112, 113, to the effect that when special powers are conferred, or special methods are prescribed for the exercise of a power, the exercise of such power is within the maxim *expressio unius est exclusio alterius*, and 'forbids and renders nugatory the doing of the thing specified, except in

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the particular way pointed out'); State ex rel. v. Clifford, 228 Mo. 194, 207, 128 S.W. 755, 758, 21 Ann. Cas. 1218)." (Underscoring ours)

In the case of Dietrich v. Jones, 53 S.W. (2d), 1059, 1.c. 1061, the rule is adopted from Corpus Juris as follows:

"Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, namely, that the thing shall not be done otherwise'. 25 C.J. 220, note 16 (c)."

In addition to the above rules of statutory construction we also cite the recent case of State v. Phillips which provides that if the statute is clear and unambiguous, it is not necessary to search for an unreasonable interpretation of the statute. In that case, reported in 160 S.W. (2d) 764, 1.c. 769, the court said:

"If section 8437, supra, is clear and unambiguous, it must be construed in accordance with its manifest intent and we may not search for a meaning beyond the statute itself. State ex rel. Cobb v. Thompson, 319 Mo. 492, 5 S.W. 2d 57, 59."

CONCLUSION

It is therefore the opinion of this office that Section 119 of the Corporation Act of 1943, is clear and unambiguous, and definite in its terms as to the manner in which a trust affidavit should be filed. It is also the opinion of this office that the statute should be followed and is mandatory in its direction. It is further the opinion of this office that, the above being true, an attorney for a stockholder would not be the proper person to file the trust affidavit unless he were an officer of the corporation as provided by the act.

Respectfully submitted

GAYLORD WILKINS
Assistant Attorney General

GW.sc

LIQUOR LICENSE: County Court is not authorized to return license fee paid into county treasury after vacation of premises or abandonment of business by licensee.

January 20, 1944



Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
First National Bank Building
Versailles, Missouri

Dear Mr. Marr:

This is an acknowledgment of your request to the General, for an official opinion, which is as follows:

"The wartime scarcity of alcohol beverages, such as whiskey, has forced many liquor places out of business. Many have been unable to get any kind of liquor to sell. Because of this drought, they have decided that they are out of business. There has been several requests presented to the county court about a refund of liquor license tax that has been paid to the county court, for the operation of a liquor place in Morgan County, Mo. One says she was able to operate only two months, and that she is entitled to a refund for at least six months of her total license paid. Another takes the position that she is entitled to half, back because, he closed the package liquor department, about five months after the year as of July 1, started.

"Is there any law or statute that makes it mandatory on the county court to make a refund on the licenses? Sometimes those current income is held for the budget of the next year. Many times, part of the income goes to the special road districts as per the statutes. Sometimes in the reallocating of the budget figures in November, part of this current revenue is used up to pay current accounts in certain classes."

Section 4898, R. S. Mo., 1939, provides in part as follows:

"No person, partnership, association of persons or corporation shall manufacture, distill, blend, sell or offer for sale intoxicating liquor within this state at wholesale or retail, or solicit orders for the sale of intoxicating liquor within this state without procuring a license from the Supervisor of Liquor Control authorizing them so to do. For such license there shall be paid to and collected by the Supervisor of Liquor Control annual charges.*.*"

Thereafter such section fixes the amounts to be paid as license for manufacturing and selling intoxicating liquor.

Section 4904 thereof is in part as follows:

"In addition to the permit fees and license fees and inspection fees by this act required to be paid into the state treasury, every holder of a permit or license authorized by this act shall pay into the county treasury of the county wherein the premises described and covered by such permit or license are located, or in case such premises are located in the City of St. Louis, to the collector of revenue of said city, a fee in such sum (not in excess of the amount by this act required to be paid into the state treasury for such state permit or license) as the county court, or the corresponding authority in the City of St. Louis, as the case may be, shall by order of record determine, and shall pay into the treasury of the municipal corporation, wherein said premises are located, a license fee in such sum, (not exceeding one and one-half times the amount by this act required to be paid

into the state treasury for such state permit or license), as the law-making body of such municipality, including the City of St. Louis may by ordinance determine.***" (Underscoring ours.)

The county court, under such statute, is authorized to charge a dealer in intoxicating liquors a certain fee or sum. This is to be done by an order of record. The payment of such fee or sum is a prerequisite to engaging in the business of selling liquor in the county.

In State ex rel v. Jackson, 84 S. W. (2d) 988,989 (Mo.App.) the court in speaking of county courts and their powers, said:

"***Such court is a creature of the Constitution, and its powers are limited by the terms of the various statutes defining its powers. It has no common-law or equitable jurisdiction.***"

The fee provided in such liquor act, as it pertains to counties, is a revenue measure. We assume that the fee so paid into the county treasury was voluntarily paid without protest.

In C. J. page 571, Section 178, it is said:

"Where a person applying for a liquor license voluntarily pays the whole amount demanded of him, although the charge is illegal, or the amount demanded, in consequence of a misapprehension of the law, or of the invalidity of a particular statute or ordinance, is in excess of the sum which might lawfully be exacted, he cannot recover back the amount paid or the illegal excess. But the rule is otherwise where the payment was not voluntary, but

was obtained by extortion, fraud, force or moral or legal compulsion, as in such a case he may recover back the amount or the illegal excess. Where a licensee is deprived of his license by acts or circumstances over which he has no control and without his volition, he can recover the unused portion of his license fee or tax, But this rule has no application where the licensee retains his license and voluntarily vacates his place of business, thus rendering his license ineffective owing to his own act in withdrawing from the premises.***" (Underscoring ours.)

The Supreme Court in the case of Neumer v. Jackson County, 271 Mo. 594, 600, held:

"***In order to recover from a municipal corporation a tax or fee paid to it involuntarily and under protest, one of the essential prerequisites (among others), of the right of recovery, absent a statutory rule to the contrary, is, that it must appear that the tax or fee was illegal. (4 Dillon on Municipal Corporations (5 Ed.) sec. 1617; American Union Express Co. v. St. Joseph, 66 Mo. 675, 1. c. 683.)***"

It is true that in some jurisdictions - but not in Missouri - provision is made by statute for refunding or rebating, in certain cases, money paid for liquor licenses or taxes but the general rule seems to be that, absent such statutory authority, a county court would not be invested with authority to make such refund.

Therefore, it is the opinion of this department that county courts are not authorized to refund or rebate a liquor license nor any part thereof to a licensee who

Hon. G. Logan Marr

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voluntarily vacates his place of business or abandons
such business.

Respectfully submitted

S. V. MEDLING
Assistant Attorney General

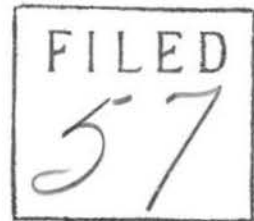
APPROVED

ROY MCKITTRICK
Attorney General

PROBATE JUDGE:

Cannot secure additional compensation for performing duties of office where there is no special statute authorizing it.

February 5, 1944



Honorable Joseph V. Massey
Probate Judge
Carter County
Van Buren, Missouri

Dear Judge Massey:

We are in receipt of your request for an opinion, dated February 3, 1944, which reads as follows:

"Please inform me if I may collect from the County Court the money I pay out once every year to have my probate records brought up to date. As I don't get much salary and therefore cannot hire a clerk, I have to hire it done once at the end of every year. The County Court asked me to write you in regard to same."

Article VI, Section 35, of the Missouri Constitution provides:

"Probate courts shall be uniform in their organization, jurisdiction, duties and practice, except that a separate clerk may be provided for, or the judge may be required to act, ex officio, as his own clerk."

Section 2440, R. S. Missouri, 1939, provides:

"The judge of probate is required to act ex officio as his own clerk, * * *: Pro-

vided, that any judge of probate may, by an entry of record in said court, appoint a separate clerk, who shall be paid by said judge and shall hold his office at the pleasure of the judge.
* * * "

Inasmuch as you have appointed no clerk, you are, therefore, regarded in the eyes of the law as ex officio clerk and must perform the duties of clerk.

Section 13295, R. S. Missouri, 1939, provides:

"Every clerk shall record the judgments, rules, orders and other proceedings of the court, and make a complete alphabetical index thereto; issue and attest all process when required by law and affix the seal of his office thereto, or if none be provided, then his private seal; keep a perfect account of all moneys coming into his hands on account of costs or otherwise, and punctually pay over the same: * * * "

Section 13837, R. S. Missouri, 1939, provides:

"It shall be the duty of all clerks of courts of record to keep just accounts of all fines, penalties, forfeitures and judgments rendered, imposed or accruing, in favor of any county, ready at all times for the inspection of the judges of their respective courts."

The statute relating to fees or salaries of probate judges is Section 13404, R. S. Missouri, 1939, which provides the fees a judge may charge for certain specific acts.

Section 13404a, Laws of 1943, page 868, provides a minimum salary for probate judges in counties of less than 19,000 population, and provides for a monthly report to the county

clerk of all fees actually collected. This act does not provide for any special compensation for preparing these reports.

There is, therefore, no special statutory provision for compensation for the preparation of reports or records in connection with the duties of a probate judge acting as ex officio clerk or for a clerk.

In *Nodaway County v. Kidder*, 129 S. W. (2d) 857, 1. c. 860, it is stated:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer.
* * * *

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. *Buder v. Hackmann*, 305 Mo. 342, 265 S. W. 532, 534; * * * *."

In the case of *City of Indianapolis v. Lampkin*, 11 N. E. 833, it was held that a city clerk could not be paid extra compensation for preparing an index of council proceedings since such work was an incident to the office and was an official duty.

CONCLUSION

It is, therefore, the opinion of this office that a probate judge may not collect from the county court an additional

Honorable Joseph V. Massey

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February 5, 1944

amount over and above his regular statutory salary or fees for the preparation of records where there is no special statute authorizing it.

Respectfully submitted

ROBERT J. FLANAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RJF:HR

RECORDER OF DEEDS: Conservator duly appointed by Federal Home Loan Bank Board upon liquidation of Federal Savings and Loan Association would have authority to release deeds of trust and the Supervisor of Building and Loan Associations of Missouri has no control over the situation.

February 11, 1944



Miss Helen Masterson
Recorder of Deeds
Clay County
Liberty, Missouri

Dear Miss Masterson:

This will acknowledge receipt of your letter dated February 7, 1944, wherein you requested an opinion from this Department. Your opinion request reads as follows:

"I will appreciate it very much if you will give me your opinion on the following matter.

"The affairs of the Liberty Federal Savings & Loan Association, of Liberty, Missouri, whose charter was granted by the Federal Home Loan Bank Board, are now in the hands of a conservator, who has been appointed for the purpose of winding up the affairs of such association.

"A number of loans have been paid to this association which are secured by deeds of trust of record in this office. It is now the desire of the conservator to release these deeds of trust, and I am in doubt as to who would have authority to make such releases.

"I find that Section 8249 R. S. Missouri, 1939, makes provision for the appointment, by the circuit court, of the supervisor as receiver, for the purpose of releasing of record any deeds of trust securing loans; but there is a question in my mind as to whether or not this section applies to Federal Savings & Loan Associations, or merely to state associations.

February 11, 1944

"If the above section does not apply to Federal Savings & Loan Associations, would an instrument, issued by the Federal Home Loan Bank Board, granting to the conservator the power to release deeds of trust of record, be sufficient authority for the conservator to make such releases, provided, of course, that this authority, together with his appointment as conservator, be duly recorded in this office, prior to his making such releases.

"I will be very grateful if you will inform me at your earliest convenience, as to what procedure I should follow.

"Thanking you for your usual courteous and prompt attention to the matter, and for opinions rendered in the past, I am"

A Federal Savings and Loan Association is a distinct Federal Agency organized under the Home Owner's Loan Act of 1933 and under the direct supervision and control of the Federal Home Loan Bank Board.

Section 1464 of title 12, U.S.C.A. provides:

"The Board (Federal Home Loan Bank Board) shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger or liquidation of such associations including the power to appoint a conservator or a receiver to take charge of the affairs of any such association and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation."

Section 8232, Revised Statutes of Missouri, 1939, provides that any state association may convert itself into a Federal Savings and Loan Association under certain conditions and

"* * * upon the grant to any association of a charter by the Federal Home Loan Bank Board the association receiving such charter shall cease to be an association incorporated under

February 11, 1944

this law and shall no longer be subject to the supervision and control of the Supervisor.* * *

This section clearly excludes the Supervisor of Building and Loans Association of the State of Missouri from any authority where a Federal Savings and Loan Association is involved. It may be distinguished from section 8249, R. S. Mo. 1939, of which you speak in your letter. That section provides for a joint responsibility between the Federal Savings and Loan Insurance Corporation and the State Supervisor where the association is one organized and existing under the Laws of Missouri, and also has this Federal Insurance. It would not apply to a Federal Savings and Loan Association which is organized under the Home Owner's Loan Act of 1933 and also possesses this Federal Insurance.

CONCLUSION.

It is therefore the opinion of this office that where a Federal Savings and Loan Association is in the process of liquidation a conservator duly appointed by the Federal Home Loan Bank Board would have full authority to release deeds of trust and the Supervisor of Building and Loan Associations of Missouri would have no control over the situation.

Respectfully submitted,

Robert J. Flanagan
Assistant Attorney-General

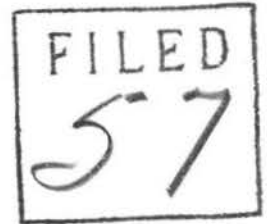
APPROVED:

ROY McKITTRICK
Attorney General

RJF:lr

COUNTY COURT: Under Sec. 11118, R. S. Mo. 1939, until taxes on real estate have been paid and collected, whether delinquent or otherwise, county court has authority to correct errors in valuations, assessment and levy, and may order such levy changed to conform to the requirements of the law.

March 6, 1944



Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We are in receipt of your letters of January 27, 1944, and February 21, 1944, requesting an opinion from this department. Your letters of request read as follows:

"By a very careful audit, and by the use of outside evidence the office of the State Auditor in making a recent audit of the officers of Morgan County, found that in 1939, the office of Collector collected over \$600.00, which was never accounted for until the audit, and which was paid in but did not show on the books of the collector.

"The levy for interest and redemption fund for the bonded debt of Morgan County, Mo., was in excess, by the levy of May 1939, and the excess levy contrary to the constitution of Mo., was caught by the tax experts of the two railroads, and the two railroad only paid to the collector the actual amount of taxes due based on what seemed to be a more correct levy. Then the two railroad moved to have the tax records against their property corrected by making a sworn affidavit that there was an erroneous assessment and that the tax records be corrected to show what was assumed to be a more correct at least not an excessive levy. And the court did order the 'erroneous assessment' corrected, but which was

an excessive levy never paid into the county collector. This order was made in order that the collector could make a settlement and balance, because he did not collect what the railroads said was excess, and he only collected what they tendered.

"Then the books of the public railroads or public utilities and of all the public utilities was changed to show the reduced levy and all paid in full except the two railroads, and the excess of the other utilities was not paid in, until discovered by the State Auditors. And the county court reducing the tax amount, only named the two railroads that complained and tendered only the reduced amount.

"Now this is 1944, and in May 1943, under Sec. 11046 R.S. Mo. 1939 the county made a 50¢ per \$100.00 for county purpose levy, and which was in excess for the reason that the increase in levy could not exceed 10% over the previous years taxes. This time after the levy, all the public utilities figured the levy should have been .43 per \$100.00 valuation, because the valuation of the county was less than \$10,000,000.00 total assessed valuation, and all these public utilities just tendered and paid into the county collector .43 on the 100.00, and left a balance against the different public utilities uncollected. Now in Jan. 1944, all these public utilities petitioned the county court for an order to charge off these excess taxes, and make their application on the basis of an 'erroneous assessment'. It looks like this application should be for an illegal levy contrary to the Mo. Const. Herein are two sample petitions to correct erroneous assessments. The others are similar. Now, the collector wants the orders made so that he will not have to account for the excess taxes not collected, in order that his settlement will balance and will not be delinquent. The excess and illegal levy, if that be what it is, seems to not concern in the least, erroneous assessments, but erroneous taxation, or erroneous

levies. This remission is for money not paid into the county, and it looks like under Sec. 11215, R.S. Mo. 1939 only provides for levies paid in and which have been declared illegal by the Supreme Court.

"The County Court wants to know, and as their advisor, I want to know just how to handle such an application, based on the above and assumed facts. After reading Sec. 11118, R.S. Mo. 1939, it looks like maybe the county court can make some correction. The County Court being a court of record, how could it take an action on these petitions for erroneous assessments when other than land is involved and it concerns an illegal levy?"

"In your request for a more definition of the purpose of my question Jan. 27, 1944, in your letter of 2/18/44, I want to further state my request:

"The first three paragraphs in my letter of Jan. 27 deal with what happened in 1939, and which was discovered by the state auditors in auditing the books of the county collector. There the levy was excessive and evaded the constitution, because the levy exceeded the amount to be raised to pay the interest and redemption fund requirements to pay on the bonded debt of the county. In that case, only two railroads caught the excess levy, and they refused to pay only the amount of taxes necessary to pay the amount needed to pay the interest and principal that matured. And herein is attached an order that was prepared by the county collector or his deputy and which was approved by the county court to cover up what was actually done.

"All the tax books concerning the public utilities in the railroad book, were changed, to make the levy rate and the resulting taxes that the two railroads said was the correct levy and which would not be excessive. These books were changed, and the tax receipts in the office of collector was changed, by some one in the office of the

March 6, 1944

collector, and purportedly by authority of the order of the county court, said order being the one enclosed. But, the full amount of the taxes were collected for the levy originally fixed by the county court levy order, collection being made from these public utilities, and the checks paid by the public utilities and the receipts marked paid held by them showed all but the two railroads paid the original levy in full. Some one in the office of the county collector's office kept the difference between the original levy and the subsequent levy that was supposed not to be excessive for collection of taxes for the interest and redemption fund.

"Mr. W. A. Holloway can explain about this embezzlement in the office of the collector, if I have not made the plan clear.

"Now, my question is how to avoid a repetition of the above procedure. In 1943, the assessed valuation in Morgan County increased. The county was allowed to increase the levy for county purposes, from 40¢ to 50¢ per 100.00; but Section 11046 R. S. Mo. 1939, restricts the resulting increase to only 10% per year, that is, the county could not levy the full 50¢ per 100.00 valuation for county purposes, but must increase the levy gradually. See Sec., supra. But in May 1943 the county court did increase the levy to 50¢ per 100.00, from 40¢ per 100.00. The public utilities caught the excess of levy for county purposes, and said that the levy should have increased only 10% and should be about 43¢ per 100.00, instead of 50¢ per 100.00, and that the jump from 40¢ a hundred to 43¢ per hundred was the correct jump, and sent in only enough tax money to make 43¢ per hundred. This 43¢ being for county purposes.

"Now, these public utilities have filed petitions before the county court to make an order correcting the tax books, so that the tax books will show that the collector can collect only 43¢ per 100.00 valuation, instead of the 50¢ per hundred valuation,

such as his books show and which he is charged up with. I sent in copies of their petitions to correct an 'erroneous assessment.' The assessment was not erroneous. If anything, the levy was excessive. The county court wants to make an order so that if only the 43¢ is collected by the collector, then this excess of about 7¢ per hundred will be remitted, and the collector not charged, but in such a way that the original levy will not be collected against others, and then not accounted for, such as was done in 1939.

"The public utilities did not pay these excessive levies for county purposes into the hands of the collector, and these levies have not been declared illegal by the Supreme Court, such as are defined in Sec. 11215 R. S. Mo. 1939.

"Under these petitions to correct an erroneous assessment, would the county court have any legal right to make a correction of an excessive levy under Sec. 11118 R. S. Mo. 1939? Does that section cover excessive levies? And now, how should the order be written in order to make any correction?"

A brief statement of the situation set out in your letters of January 27, 1944, and February 21, 1944, is in order.

Morgan County levied taxes in excess of the amount necessary to pay the interest and redemption fund requirements on the bonded debt of the county. Morgan County has also been levying a rate for county purposes in excess of the rate provided in Section 11, Article X of the Constitution of Missouri, and Section 11046, R. S. Mo. 1939. In each instance a portion of the taxpayers have paid their tax in full, and in each instance a taxpayer has refused to pay the amount in excess of the constitutional limitations.

There can be no question but what Morgan County has the authority under the Constitution to levy taxes sufficient to pay the annual interest on funding bonds and whatever rate is

necessary to provide a sinking fund for the payment of the principal of the bonds as they become due.

Section 3282, R. S. Mo. 1939, provides as follows:

"Any county, city, village, town, township, parts of townships or school district, issuing its bonds for the purpose aforesaid, shall, at the time of issuing the same, provide in the express manner provided by law for the levy and collection of an annual tax sufficient to pay the annual interest on such funding bonds as it falls due, and a sufficient sinking fund for the payment of the principal of such bonds when they become due."

In the case of the excess taxes paid under the levy for interest and sinking fund on the bonded indebtedness of Morgan County, Section 11215, R. S. Mo. 1939, provides as follows:

"Wherever, in any county in this state, money has been collected under an illegal levy, the county court of such county or counties is hereby authorized to refund the same by issuing warrants upon the fund to which said money had been credited, in favor of the person or persons who paid the same as shown by the collector's books: Provided, that should the person in favor of whom any warrant or warrants are issued be dead or unable to appear in person, then the same shall be paid to his heirs or legal representatives: Provided further, that said county court or courts may, in their discretion, refund, in addition to the money collected, interest which may have accrued upon the same, not to exceed six per cent: Provided further, that before any levy shall be considered illegal, it shall have been so declared by the supreme court of the state of Missouri: Provided further, that the provisions of this section shall only apply to those counties in which the money collected under said illegal

levy is either in the county treasury or within the control of the county court:
Provided further, that the county court so refunding said money shall specify the time in which said money shall be refunded, and all warrants left on hand after the expiration of such time shall be by said county court canceled, and the money and interest turned into the school fund of the county."
(Emphasis ours.)

The payment of this illegal tax was a voluntary payment. Without such finding of the Supreme Court declaring the tax illegal, as provided in Section 11215, supra, the following rule applies. The rule is set out in the case of *Brewing Company v. St. Louis*, 187 Mo. 1. c. 376:

"It is a well-settled rule of law that money paid through a mistake of fact, may be recovered in an action for that purpose. (15 Am. and Eng. Ency. Law (2 Ed.), p. 1103, and cas. cit.) But this rule is subject to the qualification that the party paying must make the payment under a bona fide belief that the money is due. For if he did not believe he owned the money at the time he paid it, he can not recover it. (Idem, p. 1105.)

"This rule applies to payments to municipal corporations as well as to individuals. (20 Am. and Eng. Ency. Law (2 Ed.), p. 1158, and cas. cit.) But in all such cases the mistake must be one of fact and not of law, for all persons are deemed to have notice of the law. (Ibid.) An analysis of the cases relied upon by the plaintiff shows that they follow this rule, or else that there was an element of duress in the payment.

"The rule stated has been uniformly followed in this State in reference to all kinds of payments, including taxes, licenses, and claims, and the doctrine is firmly established that payments made with a full knowledge of all the

facts constitute voluntary payments and can not be recovered, and that mistake or ignorance of law gives no right to recover. (Walker v. St. Louis, 15 Mo. l.c. 575; Christy's Admr. v. St. Louis, 20 Mo. 143; Claflin v. McDonough, 33 Mo. 412; Couch v. Kansas City, 127 Mo. 436; Teasdale v. Stoller, 133 Mo. 645; Douglas v. Kansas City, 147 Mo. l.c. 437; see, also, 22 Am. and Eng. Ency. Law (2 Ed.), pp. 609 and 613.)"

This section will also apply to any payment of taxes in excess of the constitutional limits when the tax is for county purposes. The net result, therefore, is that before a refund can be made to a taxpayer, the tax must have been declared illegal by the Supreme Court of Missouri and the taxes must be in the possession or under the control of the county court.

A taxpayer of Morgan County, who refuses to pay taxes in excess of the legal rate, has filed a petition in the county court to correct an "erroneous assessment." This tax was a tax for county purposes. We agree with you that the question is not one of erroneous assessment but rather one of illegal levy. An erroneous assessment would involve an assessment, for example, on property exempt from taxation or property assessed at a higher or lower figure than is reasonable. That is not involved in this case. The assessment here was correct but the rate of levy was in excess of the constitutional limitation. Clearly the petition filed with the county court of Morgan County to correct an "erroneous assessment" should be denied. So the question is how and by what authority may the county court correct this situation.

The records of the collector will show a levy of 50¢ per \$100.00 valuation was made, and he has no authority to accept anything less than that. State of Missouri ex rel. Brewer, County Revenue Collector v. Federal Lead Co., 265 Fed. l. c. 309:

"There seems to be no Missouri statute conferring power on the collector to take a less sum in payment of the taxes charged to him on the tax books than the amount of such taxes as shown by such tax books."

Section 11214, R. S. Mo. 1939, authorizes the county court to correct erroneous assessments only. The only other authority that might be found in the statutes delegating power to the county court to correct errors in the levy of taxes is Section 11118, R. S. Mo. 1939. Said section reads as follows:

"In all cases where any assessor or assessors, the county court, or assessment board, or any city council or assessment board, shall have assessed and levied taxes, general or special, on any real estate, according to law, whether the same be delinquent or otherwise, and until the same are paid and collected, with all costs, interests and penalties thereon, the city council of any city and the county court of any county shall have the full power to correct any errors which may appear in connection therewith, whether of valuation, subject to the provisions of the Constitution of this state, or of description, or ownership, double assessment, omission from the assessment list or books, or otherwise, and to make such valuations, assessment and levy conform in all respects to the facts and requirements of the law. Any description or designation of property for assessment purposes by which it may be identified or located shall be a sufficient and valid description or designation."

It will be noted that this section applies to taxes, whether they are delinquent or otherwise, and "until the same are paid and collected." While it is true that in the first portion of this section the word "levy" is used in connection with the word "assessed", the use of the word is entirely different as it next appears in this section. In fact, the county court is therein given power and authority to correct any errors which may appear in connection with any general or special taxes and "to make such valuations, assessment and levy conform in all respects to the facts and requirements of the law."

Provision has been made under the statutes for refund of taxes paid under an excessive and illegal levy, and it would seem logical that provision should be made in those cases, as here, where there is an excessive levy and the tax has not been paid. That seems to be the purpose of Section 11118, *supra*.

This construction is further strengthened by a statement by Judge Ellison in *State ex rel. Merritt v. Gardner*, 148 S. W. (2d) 1. c. 784:

"There is another statute, Sec. 11118, R.S. 1939, Sec. 9946, R. S. 1929, Mo. Stat. Ann. Sec. 9946, p. 7989, Laws Mo. 1933, p. 424, which appellant seems to have overlooked. It authorizes the county court (not the county board of equalization) in its discretion to correct any errors which may appear in connection with the assessment and levy of taxes, including those of valuation, whether the taxes be delinquent or not, until they are paid or collected, with all costs. We are not called upon here to construe this statute; but suggest that appellant may possibly obtain relief from the county court thereunder if the assessment complained of is as oppressive as his petition alleges. See *State ex rel. Brewer v. Federal Lead Co.*, D. C. 265 F. 305; *State ex rel. Teare v. Dungan*, 265 Mo. 353, 373, 177 S. W. 604, 610 (5)."

It is true that the above statement is dictum and it seems to be in direct conflict with the decision rendered by Judge Shain of the Kansas City Court of Appeals in *School District No. 46 v. Stewartville School District*, 110 S. W. (2d) 399, 232 Mo. App. 631. However, it seems more reasonable to believe that the statutes would make provision for both situations, that is, where the tax has been paid under an excessive levy and where the tax has not been paid under an excessive levy, than to interpret the statutes as providing for only one of the above mentioned situations. For that reason we are inclined to adopt the suggestion made by Judge Ellison in the

March 6, 1944

Gardner case, in preference to the opinion in the School District case, and consider that Section 11118, supra, authorizes the county court to make an order changing the rate of levy on real estate to correspond with the law.

We find no statute authorizing the county court to make any correction of a levy in cases where personal property is involved.

We do not have under consideration the legality of a levy of 43¢ per \$100.00 valuation for county purposes in Morgan County, nor do we have any suggestions concerning a method to compel the county court in the future to levy a legal rate.

The above and foregoing constitutes the opinion of this department.

Respectfully submitted

RALPH C. LASHLY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RCL:HR

COUNTY COURTS: No statutory authority to sell, discount or assign notes or bonds.

April 10, 1944



Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Mr. Marr:

This Department acknowledges receipt of your letter of April 4, 1944, requesting the opinion of this office. Your letter of request reads as follows:

"A debtor of Morgan County, Mo. died intestate, and owed the county a debt secured by a note and mortgage on some real estate. The wife did not sign the note, but did sign the deed of trust. The wife wishes to protect her interest in the real estate by paying off the mortgage and the note. The wife-widow, wants to be subrogated to the estate, and stand in the shoes of the county on this first lien. She wants to put her money into the debt and security, but wants to be ahead of the other creditors of the estate to extent of the amount she is paying.

"She wants to have the county either assign the note and deed of trust, or indorse the note to her; and in either case, without recourse. The deed of trust would not be released and she would hold and own the note and the security, the deed of trust.

"If she paid, being a real party in interest and in order to protect her interest, she would be entitled to subrogation in a court of equity; but

April 10, 1944

she wants to have the note either assigned or indorsed over to her, and without recourse.

"I want an opinion if the county has any right to assign, transfer, negotiate, indorse this property of the county, to the widow? I cannot find any statute or law that permits the county to sell any of its contracts, or notes, or bonds, and then pass title to the same by an assignment or some kind of an indorsement."

Article VI, Section 36, of the Missouri Constitution, at page 121c, reads as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be prescribed by law."

County courts, as such, have limited jurisdiction and being creatures of statutory origin have no common law or equitable jurisdiction. Because of their statutory origin, these courts have only the authority to do what is permitted by statutes. *St. Louis v. Menke*, 95 S. W. (2d) 813; *State ex rel. v. Johnson*, 138 Mo. App. 306, 1. c. 314.

Further supporting the proposition that county courts are not general agents of the counties of the State, but are courts with limited jurisdiction and that any acts outside of their statutory authority are null and void, are the decisions of *Boyles v. Gibbs*, 158 S. W. 590, 251 Mo. 492; *Sturgen v. Hampton*, 88 Mo. 203; *King v. Maries County*, 249 S. W. 418, 297 Mo. 488 and *State ex rel. v. Clinton County Court*, 185 S. W. 1149, 193 Mo. App. 373. The case of *Saline County etc., v. Thorp, etc., et al.*, 337 Mo. 1140, tends to uphold this proposition.

We have been unable to find any statute or authority which would permit the county court to sell, discount or assign notes or bonds in the manner set forth in your request. In the

Hon. G. Logan Marr

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April 10, 1944

absence of such specific authority, the county court would not have the power to do this.

The above and foregoing constitutes the opinion of this Department.

Respectfully submitted,

RALPH C. LASHLY
Assistant Attorney-General

APPROVED:

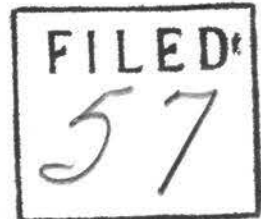
ROY McKITTRICK
Attorney-General

RCL:EG

CHILDREN. : "Neglected Child" question of fact. Would
: not include child suffering from cruelty
: of parents in counties of less than 50,000.
:

July 14, 1944

Honorable G. Logan Marr
Prosecuting Attorney, Morgan County
Versailles, Missouri



Dear Mr. Marr:

This will acknowledge the receipt of your letter of July 5, requesting an opinion of this office. Such letter, omitting caption and signature, is as follows:

"For three or four years, we have a female child now, 11 years old, who is afflicted with osteomyelitis of the hip bone. She goes to school, and uses two crutches most of the time. Her leg has been x-rayed and shows the diseased condition of the bone. The child wants to be treated, her 20 year old sister and her 18 year old brother want her to be treated. Her mother is dead. The father is unable to work, poor, and obtains social security relief. The father is ignorant and stubborn and refuses to permit any treatment for the child. The 20 year old sister and the 18 year old brother supports the family with their earnings and they want the child treated before her condition gets worse.

"The father makes the statement to the welfare workers that the child is showing some improvement, and perhaps she is in a minor way. But the poor child is compelled to go to a country school a mile away up and down two big hills, and this is a hardship on this crippled child. A school bus comes right by her door, and it will cost the father nothing to get the child to school on the bus and there will be no charge for tuition.

"The disease named can be treated scientifically for a cure, and without any apparent danger and without any cost to the father.

July 14, 1944

"The children named, the neighbors, the social security people seeks to make the father permit the treatment of the child. My office is called on for an opinion as to whether there is any law or remedy under the statutes that will enable a court order to be obtained to force the father to yield to a treatment of the child? I am requesting an opinion if the father can be compelled to submit the child to a treatment for the disease named?"

Section 9698 R. S. Mo., 1939, provides:

"This article shall apply to children under the age of seventeen years, in counties of less than 50,000 population, who are not now or hereafter inmates of any state institution or any institution incorporated under the laws of the state for the care and correction of delinquent children. When jurisdiction has been acquired under the provisions hereof over the person of a child, such jurisdiction shall continue, for the purpose of this article, until the child shall have attained the age of 21 years. For the purpose of this article, the words 'neglected child' shall mean any child under the age of seventeen years, who is homeless or abandoned, or who habitually begs or receives alms, is found living in any house of ill-fame, or with any vicious or disreputable person, or who is suffering from depravity of its parents, or other person in whose care it may be. The words 'delinquent child' shall include any child under the age of seventeen years who violates any law of this state, or any city or village ordinance, or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons, or who is growing up in idleness or crime, or who knowingly visits or enters a house of ill-repute or any place where any gaming device is operated; or any saloon or dramshop where intoxicating liquors are sold; or who is either habitually truant from any day school, or who, while in attendance at any school, is incorrigible, vicious or immoral. Any disposition of any delinquent child under this article, or any evidence given in such cases shall not in any civil, crim-

July 14, 1944

inal or other cause or proceeding whatever in any court be lawful or proper evidence against such child for any purpose whatever, except in subsequent cases under this article. The word 'child' or 'children' may mean one or more children, and the word 'parent' or 'parents' may mean one or both parents when consistent with the intent of this article. The word 'association' shall include any corporation which includes in its purpose the care or discipline of children coming within the meaning of this article. The words 'probation officer,' in all sections of this article, defining his powers and duties shall include his deputies. "

You will notice that this section defines "neglected child" as one under the age of seventeen years who is homeless or abandoned, or who habitually begs or receives alms, is found living in any house of ill fame, or with any vicious or disreputable person, or who is suffering from the depravity of its parents or other person in whose care it may be. This section applies to counties of less than 50,000 population, which is your situation.

Section 9673 R. S. Mo., 1939, which applies to counties over 50,000 defines "neglected child" as follows: "* * * any child under the age of seventeen (17) years, who is destitute or homeless, or abandoned, or dependent upon the public for support, or who habitually begs or receives alms, is found living in any house of ill-fame, or with any vicious or disreputable person, or who is suffering from the cruelty or depravity of its parents, or other person in whose care it may be; * * *". It must be noted that the word "cruelty" is specifically used in Sec. 9673, whereas, it is not used in Sec. 9698, which applies to counties of your population. Of course, the question of whether a child is a neglected child under either of these sections is purely a question of fact, however, the facts must support one of the elements of the definition. From the facts stated in your letter, it seems to me that the most that could be said, as far as determining whether your particular child was neglected or not, would be that it was suffering from the cruelty of its parents. Now, as I have heretofore pointed out, this is not grounds for declaring the

July 14, 1944

child "neglected" in counties of less than 50,000 population nor would the Child Hygiene division of the State Board of Health have any authority to interfere in a situation of this kind, inasmuch, as Sec. 9738 prohibits them from privately examining or treating any school child without the consent of its parents or guardian.

It might be possible for a civil suit to be brought to have another person appointed guardian on the ground that the parents are incompetent or unfit under Sec. 378 R. S. Mo., 1939. See *Brewer v. Corey*, 148 Mo. App. 193. A civil suit of this type would of course, not concern you in your office as prosecuting attorney.

CONCLUSION.

It is therefore the opinion of this office that the question of whether a child is a "neglected Child" within the meaning of the laws of this state is one of fact, and that in counties of less than 50,000 population a "neglected child" does not include one suffering from the cruelty of its parents, nor may the State Board of Health cause a child to be treated for osteomyelitis without the consent of its parents.

Respectfully submitted

ROBERT J. FLANAGAN
Assistant Attorney General

APPROVED:

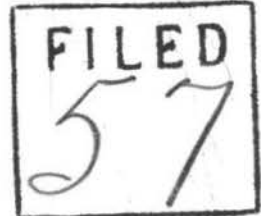
ROY McKITTRICK
Attorney General

RJF:LeC

SCHOOLS.

: Where default occurs on loan of
: surplus school funds made under
: sections 10434 and 10435, R. S.
: Mo., 1939, County Court makes
: order of foreclosure as is pro-
: vided by Sec. 10387 R. S. Mo.
: 1939.

August 9, 1944



Honorable Gordon J. Massey
Attorney at Law
Ozark, Missouri

Dear Mr. Massey:

This will acknowledge the receipt of your letter of July 15, requesting an opinion from this office, which is as follows:

"A common school district has more money on hands than they need and can according to section 10434 R. S. Mo., 1939, loan some of it according to section 10435.

"The county court makes the loan and default is made. Who makes the order of foreclosure, the county court of the school board. Just what procedure is necessary if the school district makes the order.

Section 10434, R. S. Mo., 1939, provides:

"Whenever it shall be found that any school district has any surplus funds in the county treasury, the directors of such school district may make application, in writing, to the county court, setting forth that school funds are accumulating beyond the wants or necessities of such district. Upon such application, it shall be the duty of the county court to cause such funds to be loaned for the use and benefit of such school district."

Section 10435, R. S. Mo., 1939, provides:

"Such school funds shall be loaned at the same rate of interest and in the same manner as township school funds are loaned: Provided that no school tax shall be levied in such district other than for incidental expenses during the time for which such surplus fund

Aug. 9, 1944

is sought to be loaned; and provided further,
that a free public school shall be maintained
in such school district for at least eight
months in each year. (R. S. 1929, Sec. 9318.)"

You will note that the funds must be loaned at the
same rate of interest and in the same manner as township
school funds are loaned.

Sec. 10383 R. S. Mo., 1939, provides for the investment
of the township school fund. Section 10384, 10384 A, 10384 B,
10385, 10386, Laws of Mo. 1943, p. 881, provide for the
type of loan, insurance, security, etc.

Sec. 10387, R. S. Mo., 1939, provides:

"Whenever the principal and interest, or any part
thereof, secured by mortgage containing a power to
sell, shall become due and payable, the county
court may make an order to the sheriff, reciting
the debt and interest to be received, and com-
manding him to levy the same, with costs, upon
the property conveyed by said mortgage, which shall
be described as in the mortgage; and a copy of such
order, duly certified, being delivered to the
sheriff, shall have the effect of a fieri facias
on a judgment of foreclosure by the circuit court,
and shall be proceeded with accordingly. (R. S. 1929,
S. 9254.)"

You will note that the County Court makes the order to
the Sheriff causing the foreclosure.

CONCLUSION.

It is therefore, the opinion of this office that when
a loan of surplus funds is made under Sections 10434 and
10435, R. S. Mo., 1939, and there is a default, the County
Court makes the order of foreclosure as is provided by
Sec. 10387 R. S. Mo., 1939.

Respectfully submitted

APPROVED:

ROBERT J. FLANAGAN
Assistant Attorney General

ROY McKITTRICK
Attorney General

RJF:LeC

RECORDER OF DEEDS: A fee may not be charged by a Recorder of Deeds for recording a discharge of a soldier in military service.

September 21, 1944



9/26

Miss Helen Masterson
Recorder of Deeds
Clay County
Liberty, Missouri

Dear Miss Masterson:

This department acknowledges receipt of your letter of September 1, 1944, requesting an opinion of this office. Your letter is as follows:

"I will appreciate it very much if you will give me your opinion on some phases of the law regarding the recording of discharges of those in the armed forces.

"In as much as some of the recorders in this state are on a salary, and others operate on a fee basis, this law interpreted literally, would throw the expense of recording discharges on the county, in some counties, and on the recorder in others. I have been informed that in some of the states in which the recording official handles work on a fee basis, the laws relative to recording discharges, specify that the cost of recording shall be borne by the county in which the discharge is recorded. Since the law in our state does not so specify, will you kindly give me your opinion on the following questions: -

"1. Is it the purpose of this law that in some counties the fee for recording discharges shall be borne by the county, and in others by the recorder - or

"2. Would you interpret this law as meaning that the county should bear this expense in each county in the state?

"3. If the county court is willing to bear the expense of recording discharges in counties in which the recorder is on a fee basis, is it possible under the law, for them to do so?

"4. Would the legislature have the authority to force an individual to bear this expense?

"5. This law makes no limitation as to what discharges the recorder may be forced to record. In your opinion should the person discharged not be an actual resident of the county in which the discharge is recorded, or a resident of such county at the time of his entrance into the service?

"I heartily approve of the law in so far as it provides that this service shall be furnished veterans without charge, however, I feel that it shows great discrimination against recorders in certain counties. In addition to recording discharges free of charge, the veteran is entitled to as many certified copies of the record as he requires. No doubt in many counties where this expense must be borne by the recorder (if that is your interpretation of the law), with thousands of discharges to be recorded and certified copies to be furnished, the expense of deputy hire will exceed the fees received in the office. I am sure that in this county, and no doubt in many others, it will run into thousands of dollars.

"Since this law went into effect we have, of course, been recording discharges free of charge and it has made little difference as very few have been recorded; but I am wondering what the fate of the recorders will be in the near future when the boys are discharged in large numbers."

Section 15077A, Laws of Missouri, 1943, page 643, reads as follows:

"Any person who is the holder of a discharge from the Armed Forces of the United States may demand that said discharge be recorded by the recorder of deeds of any county in this State, including the recorder of deeds of the City of St. Louis, and it shall be the duty of said recorder of deeds to record said discharge without any fee or compensation therefor."

In view of the plain words of the above quoted section of the statute no interpretation of the statute is required, and our answer is in the negative to each of the first three questions contained in your inquiry.

Although the fourth question is not too clearly phrased, we might point out that the Legislature could, of course, repeal the above quoted section and could also repeal Section 15077, R. S. Mo. 1939, and could enact a statute providing for fees to be charged for recording soldiers' discharges, in which event the individual would be required to bear the expense. That, of course, is not the present state of the law and is merely a statement of what might be done by the Legislature. The above mentioned sections of the statute are in full force and effect and provide that the recorder shall record these discharges "without any fee or compensation therefor."

In answer to the fifth question, the exact words of Section 15077A, supra, provide for the recording by the recorder of deeds of a discharge of "any person who is the holder of a discharge from the Armed Forces of the United States." It is clear that this section applies to not only residents of the State or residents of any particular county but provides that this free service be rendered to any person who holds a discharge from the armed forces of the United States. In our opinion this statute is susceptible of but one interpretation and that is that any member of the armed forces of the United States may present a discharge to be recorded by the recorder of deeds of any county of this State and he shall

receive this service from the recorder of deeds absolutely free of charge.

In the absence of statutory provision providing for a fee for recording an instrument, a recorder may not charge a fee. Upholding this statement, is the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, 860, wherein it is said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S. W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

In the event the recorder should attempt to collect the cost or a fee from a source other than from a soldier for recording the discharge, it would be necessary for the recorder to have specific statutory authority upon which to base the charge. We know of no such authority.

Miss Helen Masterson

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Sept. 21, 1944

The above and foregoing constitutes the opinion
of this department.

Respectfully submitted,

RALPH C. LASHLY
Assistant Attorney General

APPROVED:

VANE C. THURLO
Acting Attorney General

RCL:EG

ABSENTEE BALLOT: Absentee ballot of person who expects to be absent from his county, but within the State on election day, should be counted although voter happens to be out of State all or a portion of election day.

November 18, 1944

11/20

Mr. P. M. Marr
Attorney at Law
Milan, Missouri

FILE

57

Dear Mr. Marr:

We have for attention your communication of today, in which you request the opinion of this Department in connection with the counting of absentee ballots in the general election held in November, 1944.

We submit our opinion on the question as stated:

"A resident of Missouri and of Sullivan County makes application to the County Clerk for civilian absentee ballot, duly votes it at the County Clerk's office at the time, and deposits same with the County Clerk, all within the time provided by law for voting an absentee ballot.

"On the day of the election such absentee voter happened to be out of the State for all or a portion of the day. Can such voter's ballot be validly challenged on the ground that the voter was out of the State on the day of the election?"

We herewith set forth Section 9, Article VIII of the Missouri Constitution, from which our absentee ballot laws stem:

"Qualified electors absent from the state on military or naval service shall, and qualified electors absent from their counties but within the state may, be enabled by law to vote at general or special elections."

Section 11470, Laws of Missouri, 1944, Extraordinary Session, page 19, provides as follows:

"Any person being a duly qualified elector of the State of Missouri, other than a person in military or naval service, who expects to be within the State of Missouri but absent from the county in which he is a qualified elector on the day of holding any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected, for any congressional, state, district, county, town, city, village, precinct or judicial offices or at which questions of public policy are submitted, may vote at such election as hereinafter provided."

We do not find that this section of the statute, or Section 11470, Laws of Missouri 1943, page 527, has been construed. Of course, Section 11470, passed at the 1944 Extraordinary Session of our Legislature, is the last expression of the General Assembly on this question.

It is our opinion that if a person, having all of the legal qualifications to vote in the county, presents himself or herself at the County Clerk's office of his or her county, as stated in your question, within the time as provided by law, and makes application as provided by law, in which the person states that he or she expects to be within the State of Missouri, but absent from the county in which he or she is a qualified voter, on the day of the election, and casts his or her ballot accordingly, that he or she has legally cast the vote. The fact that the absentee voter happens to be out of the State for all or a portion of the election day does not disfranchise the voter, and the vote cannot be validly challenged on the ground that the voter happened to be out of the State all or a portion of the day of the election. The application, made by the voter at the time he applies for his ballot, is made in contemplation of Section 11470, Laws of Missouri, Extraordinary Session 1944, page 19, supra. That is, that the person expects to be within the State but absent from the county. It will be observed that the application by a voter for an absentee ballot, under the provisions of Sec-

tion 11472, Laws of Missouri, Extraordinary Session 1944, page 19, "may be made on a blank to be furnished by the county clerk or board of election commissioners or other officer or officers charged with the duty of furnishing ballots as aforesaid, or may be made in writing by first class mail addressed to such officer or board signed by said applicant."

We do not think that any court would disfranchise a voter who happened to be out of the State for all or a portion of the day on which the election was held, if, at the time he or she made application for a ballot he or she expected to be within the State but absent from his or her county, and, at the time of casting the ballot he or she made the affidavit substantially in the form as set forth in Section 11473, Laws of Missouri, 1944, Extraordinary Session, page 20, which affidavit states that the voter expects to be absent from said county of his or her residence on the date of said election. In other words, we think the expectation which the voter has expressed at the time of making his application for a ballot of being absent from the county of his or her residence, but within the State, and the continuation of such expectation at the time he casts his ballot, determines the question. It must be remembered that the election laws are made to induce eligible persons to exercise their right of franchise and not to discourage them in that great privilege and throw out their ballots, unless upon sound legal reasons.

CONCLUSION

It is, therefore, our opinion that the voter, under the conditions as stated above, has legally cast his ballot, and that same should be counted as cast.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

CRH:CP

ELECTIONS: : Absence from State on military service
: is not itself a change of residence
: as would bar candidacy for public office.

May 24, 1944

Honorable J. C. McDowell
Judge of the Circuit Court
28th Judicial District
Charleston, Missouri

5/31



Dear Judge McDowell:

This will acknowledge receipt of your letter of May 5, 1944, requesting an opinion of this office, which is as follows:

"A young man, by the name of Ed DeField, now in the Armed Forces in England was and is still the Assessor of our County, acting by Deputy.

"After his induction and while in the Army he has announced for re-election. Would you kindly give me your opinion as to whether or not he is eligible for re-election, he being in the armed services at the time he announced for office."

18 Am. Jur. Sec. 126, " * * * As a general rule anyone who has the qualifications to fill an office may be a candidate for election to that office. * * * "

From a reading of your letter, the only question presented would be, "does absence from the county on military service disqualify a person from becoming a candidate for public office?"

The Missouri Constitution, Art. VIII, Sec. 10, provides:

"No person shall be elected or appointed to any office in this state, civil or military, who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment."

"Residence" in the state for one year preceding election is necessary.

May 24, 1944

However, Sec. 7 of Art. VIII, provides:

"For the purpose of voting, no person shall be deemed to have gained a residence by reason of his presence, or lost if by reason of his absence, while employed in the service either civil or military, of this state, or of the United States; nor while engaged in the navigation of the waters of the State, or of the United States, or of the high seas, nor while a student of any institution of learning, nor while kept in a poor-house or other asylum at public expense, nor while confined in public prison. "

Thus the constitution specifically provides that for the purposes of voting one does not lose one's residence by being absent on military service. It is difficult to see how the same argument can be avoided with reference to candidates for office. Residence in any event is largely a matter of intention, and intention is to be deduced from the acts and utterances of the person whose residence is in issue. In re, Lankford Estate, 272 Mo. 1. Here the proposed candidate is your present assessor and has been carrying on the office by deputy. This in itself is practically conclusive evidence of an intention to be a resident of your county.

CONCLUSION.

It is, therefore, the opinion of this office that absence from the state or county on military service would not in itself constitute a change of residence as would bar a candidacy for county office.

Respectfully submitted

ROBERT J. FLANAGAN
Assistant Attorney General

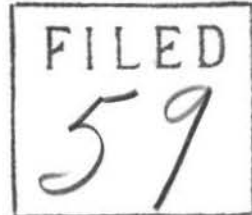
APPROVED:

ROY MCKITTRICK
Attorney General
RJR:LeC

PROBATE JUDGE:

May resign office.

February 3, 1944



Honorable M. K. McMurtrey
Probate Judge
West Plains, Missouri

Dear Judge McMurtrey:

We are in receipt of your request for an opinion,
dated January 31, 1944, which reads as follows:

"I am writing you this letter at the suggestion of the Prosecuting Attorney of the county. I am holding the office of probate judge of the county by virtue of section 2462. Some of the lawyers are of the opinion that a probate judge cannot resign his office. This question I presented to the Prosecuting Attorney. The duly elected Judge is very ill and has indicated his intentions of wanting to resign, but was advised he could not.

"An opinion from your office would clear up this situation."

Article VI, Section 32, of the Missouri Constitution provides:

"In case the office of judge of any court of record become vacant by death, resignation, removal, failure to qualify, or otherwise, such vacancy shall be filled in the manner provided by law."

Article 6, Section 34, of the Missouri Constitution, and Section 1990, R. S. Missouri, 1939, provide that a probate court shall be a court of record.

Section 11509, R. S. Missouri, 1939, provides:

"Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of lieutenant-governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election * * * *."

It is stated in 35 C. J. 943, Section 43:

"The term or tenure of a judge, in reference to the incumbent, may become terminated by reason of his resignation. In order to have a resignation become effective it must be accepted by the proper authority."

In Mechem on Public Officers, Section 409, it is stated:

"It may be said in a general way that a public officer has the right to resign his office at any time, and some authorities have declared this right in unqualified terms. The weight of authority, however, and the obvious dictates of public policy require that the right shall be declared in a more restricted manner."

Honorable M. K. McMurtrey

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February 3, 1944

The restrictions, Mr. Mechem goes on to state, in Sections 412, 413 and 414, are that the said resignation must be made to the proper authority and that it must be accepted. In Section 415 he states the acceptance may be manifested either by a formal declaration or by the appointment of a successor.

CONCLUSION

It is, therefore, the opinion of this office that a probate judge may resign his office provided he submits his resignation to the proper authority, in this instance the Governor, and also provided that the Governor accepts said resignation.

Respectfully submitted

ROBERT J. FLANAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RJT:HR

ELECTION: Section 11550, as enacted by the
62nd General Assembly, Extra Session,
1944, and Section 11551, Revised
Statutes of Missouri 1939, construed.

May 10, 1944

*Elections: Not necessary that receipt for filing fee paid
to party treasurer be filed simultaneously
with declaration of candidacy.*

5



Honorable Robert I. Meagher
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Sir:

We have your letter of May 4, 1944, wherein you request
an opinion from this department on the following statement of
facts:

"Please give me an opinion from your department
based on the following facts as to whether the
name of Chas. Barrett should be placed on the
Democrat ticket to be voted at the August Pri-
mary election as a candidate for the office of
Representative of Madison County, Missouri.

"On the 24th day of April, 1944, Mr. Chas.
Barrett a resident of Madison County, Missouri,
went into the office of the County Clerk of
Madison County, Missouri, and stated it was his
intention to file for the office of Representa-
tive of Madison County, Missouri, on the Democrat
ticket. The deputy County Clerk then prepared
in his own handwriting a candidate's declaration
for said office in the following form to-wit:

"
CANDIDATE'S DECLARATION
STATE OF MISSOURI) SS. April 24, 1944
County of Madison)

I, the undersigned, a resident and qualified
elector of the Buckhorn precinct of the Big Creek
Twp. of Madison County, State of Missouri, do
announce myself a candidate for the office of
Representative on the Democrat ticket to be voted
for at the primary election to be held on the
first Tuesday in August, 1944. And I further

May 10, 1944

declare that if nominated and elected to such office I will qualify.'

"Immediately thereafter the said Chas. Barrett read and signed said declaration in said County Clerk's Office on said date of April 24th, 1944. The deputy County Clerk then told Mr. Barrett to go to the bank and get a receipt for \$5.00 and then return said declaration. Mr. Barrett then went to the New Era Bank, of which bank the president is treasurer of the Madison County Democratic Central Committee, and at that time Mr. Barrett was informed that said treasurer was out of town having been subpoenaed for a trial in Pine Bluff, Arkansas. Mr. Barrett then, on said date of April 24th, gave said declaration to Mr. O. J. Ferguson, the publisher of the Democrat-News in Fredericktown, Missouri, together with the \$5.00 filing fee. Mr. Barrett then instructed Mr. Ferguson to get the receipt from Mr. Whitener, Treasurer of the Democrat Central Committee and return same to the County Clerk, together with the declaration. Mr. Whitener didn't return to Fredericktown until April 26th, 1944. Mr. Ferguson deposited the \$5.00 to the credit of Madison County Central Committee in the New Era Bank of Fredericktown, Missouri, on the 26th day of April, 1944, and took the duplicate deposit receipt together with the Candidate's Declaration to the office of the County Clerk on said date of April 26th, 1944, at which time the Deputy County Clerk stamped said declaration filed April 26th, 1944."

Section 11550, Revised Statutes of Missouri 1939, at the special session of the legislature called by the Governor in 1944, designated as the 62nd General Assembly, Extra Session, repealed Section 11550 and re-enacted said section, which section reads as follows: (in part)

"The name of no candidate shall be printed upon any official ballot at any primary election, unless such candidate has on or before the last Tuesday of April preceding such primary filed a written declaration, as provided in this article, * * * * *"

Section 11551, Revised Statutes of Missouri 1939, was not disturbed by the Extra Session of the legislature, a portion of which section we quote as follows:

"Each candidate, except for a township office, previous to filing declaration papers, as in this article prescribed, shall pay to the treasurer of the state or county central committee of the political party upon whose ticket he proposes as a candidate and seeks nomination, a certain sum of money, as follows, to-wit: * * * *. To the treasurer of the county central committee - five dollars, if he be a candidate for state representative or any county office; take a receipt therefor, and file such receipt with and at the time he files his declaration papers. The said sums of money, so paid by the several candidates, shall be evidence of their good faith in filing said declaration papers, * * * *."

It will be observed by comparing Section 11550, passed by the Extra Session, that it is nearly identical with Section 11550, Revised Statutes of Missouri 1939, except that the last day for filing was designated in the new section as the last Tuesday of April. Therefore, the authorities construing Section 11550 and Section 11551, Revised Statutes of Missouri 1939, are applicable to Section 11550 enacted at the extra session of the legislature.

We call attention to the case of State ex rel. Haller v. Arnold, 277 Mo., page 474, l.c. 480, wherein the court said:

" * * * * That question is: Does Section 6015 of the act supra, above quoted, absolutely require as a condition precedent to the placing by the Board of Election Commissioners of the name of a proposed non-partisan candidate on the official ballot, that the receipt of the City Treasurer for the deposit of the sum of sixty dollars shall be filed along with, and contemporaneously with the certificate of nomination of such proposed candidate?

"We have concluded that is does not. The affirmative of the question stated and presented by the facts here at issue would in our opinion and in the light of the language of the above section be too narrow a view to take of the meaning of that section. Such a view would inevitably restrict and circumscribe the right of a citizen to be a candidate for office within such limits

and hedge the privilege about with such conditions as materially to impinge upon the guarantee of the Constitution that 'all elections shall be free and open' (Section 9, Article 2, Constitution 1875.) It will be noted that the statute uses the word 'with' only, without qualifying this word by the word 'contemporaneously' or other similar word connoting, or importing, simultaneity of filing of both the receipt for the deposit and the certificate of nomination. Clearly, the language used imports and requires the filing of this receipt at the same place and with the same officer with whom such certificate of nomination is filed. * * * * *

"It is manifest that any eligible candidate for office is entitled to the whole of the last day allowed by law within which to submit himself to the electors for their suffrages. In a case like this, where the proposed candidate is in no wise at fault (the argument that he should have made up his mind earlier obviously having no weight, by reason of the truth of the premise last above) ought he to be deprived of the privilege of running for a public office by the mere adventitious fact of the absence from his office, or from the city, or from the state, of the only officer from whom the required official receipt can under the letter of the law be obtained? The Treasurer might be ill, or a case can be imagined where the death of the Treasurer might occur on the last day for filing prescribed by the letter of the statute, and wherein it would be impossible to appoint his successor in time to have such successor accept the required deposit and issue the required receipt therefor. * * *

* * * all that should be required is the earliest possible payment and obtention and filing thereafter of such receipt: provided, such filing of the receipt shall be in time to allow of the performance by the Board of Election Commissioners of the very first of the ensuing duties incumbent upon them by law. * * * * *

The view and ruling set forth in the case supra is fully sustained in the case of State ex rel. Huse v. Haden, 163 S.W. (2d) 946, 349 Mo. 982. We shall not quote from this latter case

for the reason that said opinion reiterates the quotation hereto set forth from the Haller case.

Now turning to the opinion request we note that Mr. Charles Barrett read and signed the statutory candidate's declaration in the County Clerk's office on the 24th day of April, 1944. The question then presents itself as to whether or not this was tantamount to a filing with the clerk at that time.

In this connection we call attention to the case of State v. Brubaker, 177 S.W. (2d) 623, 1.c. 624, wherein the court had this to say:

"* * * * * Appellant's attorney filed an affidavit which reads as follows:

"'Before me, the undersigned, personally appeared A. H. Garner, attorney for the defendant in the above entitled cause, who upon his oath states that within four days of October 15, 1942, he lodged in the circuit clerk's office of Newton County, Missouri, a motion for new trial, which the clerk advised him could not be filed under their rules, except when court was in session and that the clerk would keep said motion and have the court note it on his docket when he met pursuant to adjournment, and that he had no authority to file it as that was left up to the court.'

"The only answer to that affidavit is the following statement by the circuit clerk: 'Motions lodged in my office when Court is adjourned are not noted on the Judge's Docket until the Court meets pursuant to adjournment.'

"That statement lends some support to appellant's contention. We are not holding, however, that appellant has made a sufficient showing in this case for us to disregard the record as certified to this court. However, if the charge of appellant as to the practice and rule of the court above referred to is true, then certainly there exists a gross misunderstanding as to the circuit clerk's duties with reference to the filing of papers by litigants in pending suits. Section 4125, Mo. Rev. St. (1939), Mo. R.S.A., requires motions for new trial to be filed within four

May 10, 1944

days unless further time is granted. If a defendant deposits such motion with the clerk of the circuit court within the four days he has complied with the law. The depositing of the motion with the clerk constitutes a filing. The record entry or the stamp of the clerk on the motion only constitutes evidence of the filing. See *Grubb v. Cones*, 57 Mo. 83; *State ex rel. Chester, P. & S. G. R. Co. v. Turner*, 270 Mo. 49, 191 S.W. 987. The clerk must make some record of the filing of a paper when it is presented to him. He has no discretion in this matter. See *Swainson v. Bishop*, 52 Mo. 227. Note also the reading of section 944, Mo. Rev. St. (1939), Mo. R.S.A.: * * * * *

Upon this point it is the view of this department that there was a substantial compliance with Section 11550, enacted by the 62nd General Assembly (1944), with reference to the filing of the candidate's declaration with the County Clerk of Madison County, Missouri, as of date April 24, 1944.

We now turn to the question of whether or not Mr.

Charles Barrett complied with Section 11551, Revised Statutes of Missouri, 1939, which section has to do with paying the filing fee and obtaining a receipt therefor from the Treasurer of the County Central Committee of the political party upon whose ticket he proposes as a candidate and seeks nomination.

In this connection we call attention to the case of *State ex rel. Dodd et al. v. Dye*, 163 S.W. (2d) 1055, 1.c. 1057, wherein the court said:

"The receipts for the filing fees were not filed simultaneously with the declarations. Does this render the declaration void? We think not, and especially so since the agreed statement of facts shows that the fees were paid June 1, and the receipts were later filed with the respondent showing that the filing fees had been paid prior to the filing of the declarations. The receipts, at most, are evidences of payment and the time of payment. These were filed with the respondent before the time to print the ballots, and in view of the earlier payments, as shown by the receipts later filed with the respondent and accepted and marked filed by

May 10, 1944

him, we think it is too technical on the part of the respondent to refuse to act, when he had evidence to show that the fees were actually paid before the declarations were filed.

"We think we are sustained in this conclusion by the following cases by our Supreme Court: State ex rel. Haller v. Arnold, 277 Mo. 474, 210 S.W. 374, 375; State ex rel. Neu v. Waechter et al., 332 Mo. 574, 58 S.W. 2d 971, and State ex rel. Preisler v. Woodward et al., 340 Mo. 906, 105 S.W. 2d 912."

From the reading of the Dye case, supra, together with the Haller case and the Haden case, supra, it is our view that Mr. Barrett made a substantial compliance with Section 11551 because of the fact that he did all that was humanly possible, according to the statement in your opinion request, to pay the \$5.00 filing fee and procure the necessary receipt.

CONCLUSION

It is the opinion of this department that the name of Charles Barrett, resident of Madison County, Missouri, shall be placed on the Democrat ticket to be voted at the August primary election as a candidate for the office of Representative of Madison County, Missouri.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

BRC:ml

C. Treasurer
HEADING. : Officers: Field Representatives of State
: Service Officer not public officers. Nor
: do statutes preclude holding office
: of field representative and County
: Treasurer at same time. Offices are not
: incompatible.

June 28, 1944

Honorable R. Leroy Miller
Prosecuting Attorney,
Grundy County
Trenton, Missouri



Dear Mr. Miller:

This will acknowledge the receipt of your letter, dated May 29, 1944, requesting an opinion of this office, which is as follows:

"Mr. Ben W. Gallup, County Treasurer of Grundy County, is desirous of obtaining an appointment as Field Representative of the State Service Officer's Department providing he could receive this appointment and retain his office as County Treasurer.

"Mr. Gallup has been Service Officer for the local American Legion Post for the past eight years and has taken care of the servicemen's claims for the Red Cross since the beginning of the war. He stated he would have ample time to attend to the duties of the Service Officer's Field Representative as he has a deputy in the Treasurers office qualified to carry on in his absence.

"I have found no law to prevent Mr. Gallup from being appointed as Field Representative of the State Service Officer's Department and at the same time retain his office as County Treasurer. The only law I was able to find relative to the same was Section 12, Article IV of the Constitution which refers to members of the general assembly; Section 18, Article IX which refers to counties of over 200,000 (the population of our county being about 15,000); and Section 4, Article XIV which refers to federal and state officers.

"Could I have your opinion on this matter."

These rules against holding of two offices apply only where the holding of two public offices is involved. There is no question but that the County Treasurer is a public officer, but a question arises as to whether a field representative for the state service officer could be considered as a public officer. As is stated in 42 Am. Jur. Sec. 61:

"The prohibition against one person holding more than one office at the same time has reference to offices, as distinguished from positions in the public service that do not arise to the dignity of offices."

A definition of "public officer" was given in the case of State ex rel vs. Bus, 138 Mo.325 at page 331. There the court said:

"A public office is defined to be 'the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.' ***. It can make no difference that the appointment is made by the sheriff, or that it is in the nature of an employment, or that the compensation may be fixed by contract. The power of appointment comes from the state, the authority is derived from the law and the duties are exercised for the benefit of the public." (The court in the last sentence quoted was speaking of the office of deputy sheriff.)

In Hudson v. Annear (Colorado) 75 Pac.2d 587, the court said:

"Although an office is an employment it does not follow that every employment is an office; a position, the duties of which are undefined and which can be changed at the will of the superior, is not an office but a mere 'employment' and the incumbent is not an 'officer' but a mere 'employee'."

There is no specific title of "field representative" of the State Service Officer in the law but he would probably come within the word "assistants" as used in Sec. 15086 of S. B. 28 (62nd General Assembly in Extra

Session.) Section 15086 provides:

"The said State Service Officer shall employ such assistants as may be necessary, and within the limits of funds appropriated for such purpose. All of such assistants shall have served in the Military Forces of the United States and shall have been honorably discharged therefrom. The State Service Officer shall employ such attorneys, consultants, clerks, stenographers and employees as may be necessary to properly carry out the provisions of this act, and within the limits of the funds appropriated therefor."

Section 15086-A provides:

"The salary of the State Service Officer shall not exceed the sum of \$3,600 per year, and the salaries of the assistants, attorneys, consultants, clerks, stenographers and employees shall be determined and fixed by the State Service Officer, subject to the approval of the Governor."

Section 15086-D provides:

"The State Service Officer is, by himself, or through his duly appointed assistants, authorized to administer oaths, and acknowledge powers of attorney in favor of the State Service Officer, and such other instruments as shall be used in connection with applications and matter pertaining to claims of any nature against the United States of America or any State under any law or laws pertaining to the rights of veterans, their legal representatives and dependents, living within the State of Missouri."

Section 15086-E provides:

"The State Service Officer, his assistants, and all attorneys, consultants, employees and persons commissioned by the Governor shall not for themselves accept, receive or charge any money, article or thing, of value for the performance of any such service rendered to any veteran,

June 28, 1944

his or her legal representatives or dependents, at any time or in any manner, and any person who shall violate the provisions of this Section shall be deemed guilty of a misdemeanor."

Section 10384 provides:

"The State Service Officer and all subordinates and employees of said State Service Officer shall familiarize themselves with all laws, both federal and state, relating to the rights of ex-service men and women, their legal representatives and dependents* * *. It shall be the duty of the State Service Officer and his assistants to cooperate with the several offices of the United States Employment Service, the United Veteran's Administration and all other federal and state offices legally concerned with and interested in the welfare of veterans and their dependents * * *"

These are the sections in the law which relate to the assistants and other employees of the State Service Officer. The number, tenure, salary or specific duties of these assistants are not provided for in the law.

By Section 15086-D the State Service Officer can empower his assistants to administer oaths and acknowledge powers of attorney in favor of the State Service Officer. They do not have the right to take powers of attorney in their own name. All the powers and duties under the act are vested in the State Service Officer and he has complete charge over and direction of his assistants, their office does not have any power or authority in itself but is under the minute direction of the State Service Officer. It does not seem that under these considerations these assistants exercise or have vested in them any of the sovereign power of the state and hence they cannot be considered public officers.

There is no specific requirement that the county treasurer devote all of his time to the duties of his office. Indeed, Section 13799 would infer that the county treasurer could hold another office, inasmuch, as it specifically excluded sheriffs, marshalls, clerks,

collectors, or deputies of such officers from being county treasurer, thereby inferring that other office holders not within these groups could also hold the office of county treasurer; nor is there anything apparent in the laws showing the scope of the activities of these two offices that would make them incompatible. As is stated in 42 Am. Jur. Sec. 70, "Incompatibility of offices exists where there is a conflict in the duties of the offices, so that the performance of the one interferes with the performance of the duties of the other." This would certainly not seem to be the case here, the performance of the duties of one of these offices would in no way concern or conflict with the other.

Of course, it must be pointed out that your county treasurer must still faithfully and personally carry on the duties of the office of county treasurer should he accept the position of field representative. The fact that he may accept another position to occupy part of his time would not be an excuse for neglecting his duties as county treasurer. See Sec. 12828 R. S. Mo., 1939, and Art. 11, Sec. 18 Mo. Constitution, which requires an officer to personally devote his time to the performance of the duties of such office. See *State v. Yager*, 250 Mo. 388, 157 S. W. 557 and *State v. Stoner*, 113 Mo. 202, where the Court said at page 206,

"The wholesome doctrine that 'public office is a public trust' was fortified by its provision declaring it also a personal trust and that no person should thereafter hold office in this state who did not personally devote his time to the performance of his official duties. That he may have deputies who under his supervision and control, may assist him in the performance of his official functions, does not dispense with, nor in any way lessen his obligation to personally devote his time to their performance.* * *"

Hon. R. Leroy Miller

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June 28, 1944

CONCLUSION.

It is therefore the opinion of this office that a field representative for the State Service Officer is not a public officer within constitutional inhibitions against officers holding two offices at the same time; nor do the statutes of this state preclude the holding of the offices of field representative and county treasurer at the same time, and that these offices are not incompatible.

Respectfully submitted

ROBERT J. FLANAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RJF:LeC

MOTOR VEHICLES: Farmers operating motor vehicles within this state carrying their own farm products must display their name and address and weight of the vehicle. Also display the word "'Local'" on said motor vehicle.

August 24, 1944



Honorable Edwin W. Mills
Prosecuting Attorney
St. Clair County
Osceola, Missouri

Dear Sir:

We are in receipt of your letter of August 22, wherein you state as follows:

"There is general confusion as to whether under Section 8369, Subdivision 4, Laws of Missouri of 1943, every truck is required to display the name, address and licensed weight thereof.

"I have been asked frequently if farmers now have to display their names, addresses and licensed weights on their trucks when they haul their own produce, live stock and merchandise exclusively. I have advised in the negative and personally I believe this to be correct; but others, including some of the highway troopers, seem to think otherwise.

"Section 8367, R. S. 1939, defines commercial vehicles as: Those designed or regularly used for carrying freight and merchandise, or (b) more than eight passengers.

"The 20th Cent. Unabridged Dictionary, among other definitions of freight: 'To hire for the transportation of goods or merchandise'. Linked with its definitions of freight is the idea of transporting for hire or compensation, i.e. 'The price paid for transporting goods by land or sea.'

"A passenger is defined in the same authority as: One who travels by some public conveyance, as an elevator, ship, railroad train, street car, coach, etc.

"It seems clear that the drivers of school buses carrying more than eight passengers will have to comply with this new law.

"While personally I believe that in the light of the above definitions the new law does not require a farmer or other person hauling his own produce, live-stock or merchandise on his own account exclusively to display his name, address and licensed weight of vehicle thereon, yet in view of the general confusion in the matter which may affect such owners traveling outside their own home counties, I will greatly appreciate an opinion from your department which will receive statewide publicity and will certainly be in the public interest.

"I therefore respectfully request that such opinion be rendered."

Laws of Missouri, 1943, Section 8369, page 664 provides for registration of motor vehicles, and among other things sets out the registration fees of commercial motor vehicles and local commercial motor vehicles. The latter term is then defined by the above section as follows:

"The term 'local commercial motor vehicle' includes every 'commercial motor vehicle' as defined in Section 8367, Revised Statutes of Missouri, 1939, while operating within this state and used for the transportation of persons or property:

"1. Wholly within any municipality or urban community, or

"2. Wholly within any municipality or urban community and a zone extending 25 air miles from the boundaries of any municipality or urban community or contiguous municipality or urban community, or

"3. In making hauls not exceeding 25 miles in length, or

"4. When controlled or operated by any person or persons principally engaged in farming when used exclusively in the transportation of agricultural products or live stock to or from a farm or farms, or in the transportation of supplies to or from a farm or farms.

August 24, 1944

"Each commercial vehicle shall prominently display in a conspicuous place on said vehicle the name of the owner thereof, the address from which such motor vehicle is operated and the weight for which said motor vehicle is licensed; provided further, that local commercial vehicles, in addition to the above information, shall prominently display on such vehicles in a conspicuous place the word 'Local'."

On January 19, 1944, this department, in an opinion to Honorable Theo. R. Schneider, Prosecuting Attorney of Bates County, construed the above section and held any person or persons owning a truck which is principally used in the transportation of agricultural products or live stock to and from a farm or farms, or in the transportation of supplies to or from a farm or farms, is a "local commercial motor vehicle" within the meaning of Section 8369, Laws of Missouri, 1943, page 664. We reassert the conclusion hereinabove reached, and include a copy of said opinion.

The above section specifically provides in clear and unambiguous language that each commercial vehicle shall prominently display in a conspicuous place the name and address of the owner, and the weight of the vehicle, and further, that in the case of local commercial vehicles, there shall also be displayed the word "'Local'".

The case of State v. Thatcher, 338 Mo. 622, 92 S. W. (2d) 640 the Court held where the language of the statute is clear and unambiguous, there is nothing to construe and intent contrary to the evident intent can not rationally or permissibly be implied.

The intent here is to clearly have all commercial vehicles marked, including those confined to local agricultural operations, so that in the policing of the highways a rapid determination can be made whether the vehicle has paid the proper registration fee and who is the owner of the vehicle.

You direct our attention to Section 8367, R. S. Mo. 1939, which provides in part as follows:

"Wherever in this article, or in any proceeding under this article, the following words or terms are used, they shall be deemed and taken to have the meanings ascribed to them as follows: * * *

'Commercial motor vehicle.' A Motor vehicle designed or regularly used for carrying (a) freight and merchandise, or (b) more than eight passengers.
* * * * *

The Legislature has seen fit to define the meaning of the term "Commercial motor vehicle". You undertake to define certain terms in the definition in order to show that the requirement that each commercial motor vehicle display the name and address of the owner and the weight of the vehicle applies only to vehicles for hire.

Your theory is that since "The term 'local commercial vehicle' includes every 'commercial motor vehicle' as defined in Section 8367, R. S. Mo. 1939, * * *," and since the meaning of the latter term is one for hire it has no application to farm vehicles which are strictly not for hire. The difficulty of such a theory is that the Legislature has not seen fit to so restrict its definition.

In view of the following cases there can be no question but that the Legislature has the power to define the meaning that shall be ascribed to the various terms used in its own enactments. In the case of *St. Louis v. Nash*, 181 S. W. 1145, 266 Mo. 523 l.c.530 the Court said:

"There is but little doubt we opine that within limits not necessary here to discuss (since obviously the boundaries are wide enough to include the facts here), a legislative body may define the objects affected or designed so to be by its own enactments, and that we are bound ordinarily in construing its acts or ordinances to follow its own definitions.* * *"

In the case of *State ex rel. Exchange Bank v. Allison*, 56 S. W. 467, 155 Mo. 325 l.c. 330 the court said:

"But when the legislature issues a codification or revision of laws and as a part of it lays down definitions and rules of construction of terms therein used, the courts get at the meaning of the lawmakers by applying those definitions to those terms, and following those rules of construction. The definition under those circumstances is authoritative, and to be read into the statute as a part of itself.* * *"

August 24, 1944

Again in the case of St. ex rel McKinley Pub. Co. v. Hackmann, 314 Mo. 33, 288 S. W. 1007, l.c. 1010 the Court said:

"Aside from this, the power of a Legislature to define the objects effected, or sought to be effected, by its own enactments is beyond controversy.
* * * *

If the Legislature desired to restrict its definition of "commercial motor vehicles" as those designed or regularly used for carrying freight and merchandise for hire it could very easily have done so. Thus Section 8367, R. S. Mo. 1939, defining the word "chauffeur" states in part that "(b) who as owner or employee operates a motor vehicle carrying passengers or property for hire."

From the foregoing we are of the opinion that farr or other persons operating within this State and hauling ^{ers} own products, livestock, or merchandise exclusively must ^{his} prominently display his name and address on the vehicle, the weight of the vehicle, and in addition must prominently display in a conspicuous place the word "'Local'".

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

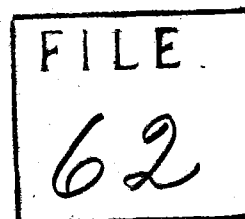
ROY McKITTRICK
Attorney General

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ASSESSMENTS: State Tax Commission cannot review assessments made by city assessing authorities.

September 15, 1944

9-19



Honorable Jesse A. Mitchell
Chairman, State Tax Commission
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of September 6, 1944, which reads as follows:

"The State Tax Commission is confronted with a problem which we have not had heretofore.

"A taxpayer of Kansas City has made a return for a certain amount on personal property as of January 1, 1944. The city authorities increased the amount of assessment, said assessment being in excess of the assessment made against the taxpayer by the county. The taxpayer petitions the State Tax Commission to review the assessment.

"Is the State Tax Commission vested with authority to review an assessment made by the city, or do Sections 11027 and 11028 apply only to assessments made by county authorities, city assessments not being referred to nor approved by the State Board of Equalization?

"The contention of the city in this case is that, since the ordinances of Kansas City fixed January 1 as the date of assessment, which is seven months later than the date fixed for state and county assessments, they are not restricted to a value not in excess

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of the county assessment.

"Your attention at a date as early as possible will be much appreciated."

Section 10 of Article X of the Constitution of Missouri reads as follows:

"The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

Pursuant to the above provision of the Constitution, the Legislature of Missouri has vested in the municipality of Kansas City the power to assess and collect taxes for local purposes. Section 371 of Article XII of the Charter of Kansas City provides as follows:

"The Council is hereby given power to provide by ordinance for the assessment, equalization, levy, extension of the tax levy, and the collection and enforcement of city taxes and assessments, general and special."

The City of Kansas City has by ordinances established a system of assessing property, including the right of the property owner to appeal to designated boards from the assessment made by the city assessor. The matter of assessing property within its boundaries and of levying taxes on said property for municipal purposes has thus been delegated to the City of Kansas City. Certain restrictions have been placed upon all cities in exercising such power, but within these restrictions cities can assess property and levy taxes upon it for local purposes.

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The State Tax Commission has been created by statute and its powers and authority defined by statute. By Section 11010, R. S. Missouri, 1939, it is made the duty of the State Tax Commission to "familiarize itself with all the sources of income provided by law for the state and its political subdivisions." It has been held by the Supreme Court of Missouri that the City of Kansas City is not a political subdivision of the state (City v. Neal, 122 Mo. 232).

Section 11012, R. S. Missouri, 1939, reads as follows:

"The commission shall fully inform itself concerning all expenditures of the public funds, by whomsoever and for whatsoever purpose made, and the necessity therefor. The commission shall within the first thirty days of each session of the general assembly report its findings and make such recommendations as it believes will best make for efficiency and economy and prevent waste of public funds: Provided, that before said report is made and compiled all departments, bureaus and institutions shall have due notice, and be required to appear and produce evidence as to the needs of such departments, bureaus or institutions."

We think the foregoing statute clearly shows that the duties of the State Tax Commission do not extend to the assessment and collection of taxes in cities. The departments, boards and institutions referred to in said section are clearly those of the state. Furthermore, there would be no purpose in the State Tax Commission reporting to the General Assembly the condition of the finances of each city in the state and the needs of such city because the General Assembly cannot levy taxes on such cities. (See Section 10, Article X, Constitution of Missouri.)

The specific powers and duties of the State Tax Commission are set out in Section 11027 of the statutes as amended, Laws of 1941, page 691. By paragraph (1) of said statute it is provided as follows:

"(1) To have and exercise general supervision over all the assessing officers of this state, over county boards of equalization and appeal in the performance of their duties, and to take such measures as will secure the enforcement of the provisions of this article, and all the properties of this state liable to assessment for taxation shall be placed upon the assessment rolls and assessed in accordance with the letter and plain provisions of the law."

City assessors are not assessing officers of this state. Their assessments are not the basis for the levy of state taxes. Their assessments may be lower than those made for state purposes. In *State ex rel. v. Jaudon*, 286 Mo. 181, 227 S. W. 48, 1. c. 52, the Supreme Court, in discussing Section 11 of Article X of the Constitution, said:

"It is argued that the city assessor need not go as high as the state and county valuation, and can therefore fix his own values, within those bounds. This may be granted, and should be granted; * * * .

* * * * As a fact, in this case, the city assessor's valuation did not exceed the standard, which we conceive to be the one fixed by said section 11, art. 10, of the Constitution, and this constitutional provision does not prohibit a lower valuation by the city assessor. Its prohibition is against excess, and not further. * * * "

It makes no difference to the state what valuation is put on city property for local taxation purposes so long as that valuation does not exceed the valuation placed upon the same property for state and county purposes.

Paragraph (5) of Section 11027, *supra*, provides as follows:

"(5) To furnish the state board of equalization at each session thereof a statement

September 15, 1944

of the value of the taxable property in each county in the state, and, when so requested, to meet with the state board of equalization. The said statement herein referred to shall include a statement of the amount to be added to or deducted from the valuation of the real and personal property of each county, specifying the amount to be added to or be deducted from the valuation of the real or personal property, to the end that the state board of equalization may adjust and equalize the valuation of real and personal property among the several counties in the state as is provided by law."

Again it is clear that the State Tax Commission is to deal with the valuation of property in each county, not in each city. The State Board of Equalization adjusts and equalizes the valuation of property among the various counties of the state. Section 18 of Article X of the Constitution of Missouri provides, in part, as follows:

" * * * The duty of said board shall be to adjust and equalize the valuation of real and personal property among the several counties in the State, and it shall perform such other duties as are or may be prescribed by law."

There would, therefore, be no purpose in having the State Tax Commission certify to the State Board of Equalization the valuations of city property since the latter body is charged with no duty with respect to equalizing valuations among the several cities of the state.

By Section 11029, R. S. Missouri, 1939, it is made the duty of the secretary of the State Tax Commission to certify to the county clerk changes made in the valuation of the property of a county by that Commission and the State Board of Equalization, and such county clerk is required to furnish a copy thereof to the assessor and one copy to the county board of equalization. Thus, when those agencies have all

Honorable Jesse A. Mitchell

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September 15, 1944

acted and the valuation of all property in the county for state and county purposes has been fixed, then a ceiling, above which cities in such county cannot go, has been determined. All property in a county would thus be valued by the State Tax Commission, including the property in cities in such county. Cities in such county can either use that valuation or a lower valuation, but they cannot use a higher valuation.

CONCLUSION

It is, therefore, the opinion of this office that the State Tax Commission does not have authority to review assessments made by city assessing authorities for purposes of local taxation.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General.

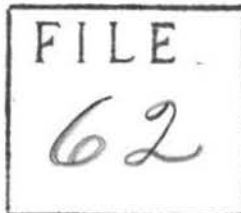
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TAXATION. : Three Story Masonic Lodge
: building having two stories rented
: commercially is not exempt from
: taxation.

November 29, 1944

Mr. Jesse A. Mitchell, Chairman
State Tax Commission
Jefferson City, Missouri

11/30



Dear Mr. Mitchell:

This will acknowledge the receipt of your letter of November 18, requesting an opinion from this office, which is as follows:

"I am enclosing, herewith, a request from the County Assessor of Johnson County for an opinion concerning the liability for taxation of certain property in that county.

"Also, enclosed are Articles of Agreement on which this company based their claim for exemption.

"Will you kindly favor this Commission — an opinion relative thereto."

Any claims of the lodge to exemption depends on a construction of Sec. 6 of Article 10 of the Constitution of Missouri and Sec. 10937, R. S. Mo., 1939. Said Sec. 6, of the Constitution provides in part as follows:

"* * * Lots in incorporated cities or towns or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable. * * *"

Section 10937, R. S. Missouri, 1939 contains language similar to the language quoted in Section 6 supra. In construing tax exemption provisions the rule that such provisions must be given

a strict but reasonable construction is to be applied.

From the facts you submit, it appears that the building in question is owned by a Masonic organization, that it is a three story building, that the first two floors are rented out for commercial purposes and that the top floor is used for the lodge rooms. The Articles of Agreement of the association provide that "a portion of the said buildings and grounds may be rented or leased for business purposes and the net income therefrom shall belong to said Corinthian Lodge Number 265, A. F. and A. M., De Molay Chapter Number 26 R. A. M. and Mary Commandery Number 19 K. T. but shall not inure to the pecuniary profit of the individual member thereof, * * *"

It must be noted that the Constitution and statute referred to above, exempt property from taxation if it is used exclusively for religious worship, for schools, or for purposes purely charitable.

The specific question you have here, was considered and decided by the Supreme Court of Missouri in the case of Fitterer vs. Crawford, 157 Mo. 51. The case involved a Masonic lodge similar to the one here. This lodge also owned a three story building, the first floor of which was rented to a store, the second was also rented and the third was used as a lodge room. The rents were used solely for the purposes of the lodge.

The court at page 63 states:

"But in order that the property in question shall be exempt from taxation, it must under the statute have been used exclusively for purposes purely charitable. The building erected upon the ground is three stories high, the first story is rented and used for a store room. The second story is also rented. The third story is used and occupied by the members of said lodge as a lodge room and ante-rooms in connection therewith. The rents received from the building are used in the liquidation of a debt incurred by the lodge in constructing the building and for no other purpose. It is upon the condition that the property is used

exclusively for purely charitable purposes,' that it is exempted from taxation. It must be remembered that it is not exempted from taxation simply because it belongs to the Masonic Lodge, but because of its exclusive use by the lodge for charitable purposes. Now as to the third story there can be no question as to its use for such purposes, but as to the other stories and the ground they are not so used, and being parts of the same building and belonging to the same party, it could not be parceled out, and thus assessed and taxed so as to bring that part of it 'used exclusively for charitable purposes' within that provision of the statute which exempts such property from taxation. Nor do we think that merely applying the rents received from the first and second stories to the extinguishment of the debt incurred in the construction of the Masonic Lodge building is 'using the building exclusively for purely charitable purposes' within the meaning of the statute. There is a very material difference between the 'use of a building exclusively for purely charitable purposes' and renting it out and then applying the proceeds therefrom to such purposes. To rent out a building is not to use it within the meaning of the statute, but in order to use it, it must be occupied or made use of. Moreover, by leasing the property the lodge becomes the competitor of all persons having property to rent for similar purposes and the plain and obvious meaning of the statute is that such property shall not be exempt from taxation."

This case is exactly in point and is decisive of the question here.

CONCLUSION.

It is therefore, the opinion of this office that

Mr. Jesse A. Mitchell

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Nov. 29, 1944

where a three story Masonic Lodge building has two stories which are rented out to businesses, it is not being used exclusively for charitable purposes and hence is not exempt from taxation.

Respectfully submitted

ROBERT J. FLANAGAN
Assistant Attorney General

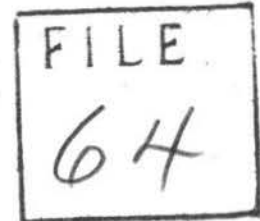
APPROVED:

VANE C. THURLO
(Acting) Attorney General

RJF:LeC

ROADS AND BRIDGES: Sec. 8668, R. S. Mo. 1939, is not applicable to counties having a population of 20,000 and not more than 50,000 inhabitants.

September 21, 1944



Mr. S. A. Morrison
County Surveyor and
Ex Officio Highway Engineer
Howell County
West Plains, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion, which reads:

"Section 8668 provides a way to dispense with the office of County Highway Engineer.

"A proviso in Section 8660 says that after the first of January 1941 in all counties in the state which contain or which may hereafter contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants the county surveyor shall be ex officio highway engineer, and his salary as county highway engineer not be less than \$1200.00 per annum nor more than \$2000.00 per annum to be determined by the County Court.

"In your opinion can the county surveyor under this proviso be deprived of the office of county engineer by the procedure set out in Section 8668? An opinion from your office will be greatly appreciated."

Article 9, Chapter 46, R. S. Missouri, 1939, is the Highway Engineer Law. It provides that the county court may appoint a county highway engineer in any county and further prescribes his qualifications, salary, duties, etc.

Section 8660, R. S. Missouri, 1939, authorizes the county court, in their discretion, to appoint the county surveyor as county highway engineer, and if he is appointed to such office his salary shall be governed by Section 8657, R. S. Missouri, 1939, which authorizes an additional amount of money in lieu of all fees except those which he receives as county surveyor.

Section 8660, supra, reads:

"The county court of the several counties in this state may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by this article; and when so appointed, he shall receive the compensation fixed by the county court, as provided in section 8657, in lieu of all fees, except such fees as are allowed by law for his services as county surveyor: Provided, that in counties in which the provisions of this article with reference to the appointment of a county highway engineer have not been suspended as hereinafter provided, the county surveyor may refuse to act or serve as such county highway engineer, unless otherwise provided by law. In the event that the county highway engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court: Provided, however, that in all counties in this state which contain or which may hereafter contain more than fifty thousand inhabitants, and whose taxable wealth exceeds or may hereafter exceed the sum of forty-five million dollars, and which adjoin or contain therein, or may hereafter adjoin or contain therein, a city of more than 100,000 inhabitants by the last decennial census, the county surveyor shall be ex officio county highway engineer, and his salary as surveyor

and ex officio county highway engineer shall be not less than three thousand dollars and not more than five thousand dollars, as may be fixed by the county court, and all fees collected in such counties by the surveyor, for his services as surveyor, shall be paid into the county treasury, to be placed to the credit of the county revenue fund: Provided, also, that in the counties last above mentioned the county surveyor, as surveyor and ex officio county highway engineer, may appoint, subject to the approval of the county court, such assistants as may be necessary, and no assistant shall receive more than twenty-one hundred dollars per annum: Provided further, that in all counties in this state which contain or may hereafter contain two hundred thousand and less than four hundred thousand inhabitants, and which county or counties contain one hundred and fifty miles or more of macadamized roads, outside of municipal corporations, and which county or counties pay to the county surveyor a salary of three thousand dollars or more annually, the county surveyor of such county or counties shall be ex officio county highway engineer: Provided further, after January 1, 1941, that in all counties in the state which contain, or which may hereafter contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants the county surveyor shall be ex officio county highway engineer, and his salary as county highway engineer shall not be less than twelve hundred dollars per annum, nor more than two thousand dollars per annum as shall be determined by the County Court."

Section 8657, supra, reads:

"The county highway engineer shall receive such compensation as may be fixed by order of the county court of his respective county: Provided, his salary, shall not be less than

three hundred dollars nor more than two thousand dollars per annum: Provided further, that in all counties in this state which contain or may hereafter contain more than fifty thousand inhabitants, and whose taxable wealth exceeds, or may hereafter exceed, the sum of forty-five million dollars, and which adjoin or contain therein, or may hereafter adjoin or contain therein, a city of more than one hundred thousand inhabitants by last decennial census, the county surveyor and ex officio highway engineer shall receive a salary of not less than three thousand dollars nor more than five thousand dollars, as may be fixed by the county court."

From a reading of Section 3660, supra, you will see that the 60th General Assembly amended that statute by adding thereto the last proviso effective January 1, 1941 (see Laws 1939, p. 674). This proviso is a command that in those counties between 20,000 and 50,000 inhabitants the county surveyor shall be ex officio county highway engineer, and for such services his salary shall not be less than \$1200.00 per annum or more than \$2000.00 per annum, to be determined by the county court.

In view of the foregoing, undoubtedly the Legislature intended that the county surveyor and ex officio county highway engineer in counties of that size shall receive, in addition to his fees as provided by law for services as county surveyor, a salary of not less than \$1200.00 or more than \$2000.00 per annum, as determined by the county court.

In *Parks v. State Social Security Commission*, 160 S. W. (2d) 823, 1. c. 825, the court in holding that one of the fundamental rules of statutory construction is to determine the legislative intent from a general consideration of the whole act, and the intent as deduced from the whole will prevail over that of a particular part considered separately, said:

" * * * It is well established that 'in construing a statute, the legislative in-

tention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applied, and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately. * * *

It is a cardinal rule of construction of statutes that effect must be given, if possible, to the whole statute and every part thereof. To this end it is the duty of the court, so far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible.
* * *

A careful research fails to find any case wherein the court has specifically passed upon your question.

In State v. Johnson, 173 S. W. (2d) 411, the county court, the respondent therein, held the last proviso hereinabove referred to in Section 8660, supra, was unconstitutional, and furthermore the county surveyor, as ex officio highway engineer, had neglected to perform the duties of county highway engineer, and they refused to permit him to perform said functions thereafter as ex officio county highway engineer, and also refused to pay him for any such services that he was willing to render. The ex officio county highway engineer filed a petition for a writ of mandamus in the Supreme Court to force the county court to reinstate him to such office and pay him a salary of \$125.00 per month from and after January 1, 1943. The Supreme Court, in making the writ permanent, held said proviso to be constitutional, and further held that the county court was without power to separate or abolish the two offices of county surveyor and ex officio county highway engineer. Regarding the removal of said officer for dereliction of duties, even though Section 8658, R. S. Mo. 1939, specifically provides for removal by the county court of the county highway engineer only, and not ex officio county highway engineer, for dereliction of duties, the Supreme Court held that such section has no application to counties wherein the county surveyor is made ex officio county highway engineer, and that if that could be done it could only be done under Article 3, Chapter 83, R. S. Mo. 1939, which is the general procedure for removal

of county officers. In so holding the court said, l. c. 414:

"We hold that the last proviso to Section 8660 is constitutional and valid, that in counties of the class to which St. Francois county belongs the county surveyor is ex officio county highway engineer and the county court is without power to separate the two offices or to abolish either of them. Under the proviso the county court does have discretion to fix the annual salary of the county highway engineer at from \$1,200 to \$2,000. As that discretion was not expressly exercised in this case, relator is entitled to the minimum salary. State ex rel. v. Bulger, 289 Mo. 441, 233 S. W. 486.

"Respondents argue that, under Section 8658, the county court had jurisdiction to remove relator for dereliction of duty. What we have already said disposes of that contention. Section 8658 has no application to counties wherein the county surveyor is made ex officio highway engineer. In such counties the county court has no jurisdiction to remove the highway engineer for any cause. The jurisdiction for that purpose is lodged in the Circuit Court by Article 3 of Chapter 83, Revised Statutes of Missouri 1939, Mo. R. S. A. Secs. 12828-12835, vol. 24, pp. 7 to 16. Even then the proceeding would be against the officer, not as 'county highway engineer,' but as 'county surveyor and ex officio county highway engineer.'"

Section 8668, R. S. Missouri, 1939, prescribes the procedure for suspending the provisions of said Article 9, Chapter 46, and reads:

"Whenever a petition, signed by at least ten per cent of the taxpaying citizens and voters representing at least two-thirds of

the townships of any county in this state, shall be presented to the county court thereof asking that a proposition be submitted to the qualified voters of the county, to determine whether or not the provisions of this article shall continue to apply to such county, the court, after due consideration, may order that a proposition for the approval or rejection of the provisions of this article be submitted to the qualified voters of the county at any general election held for the purpose of electing county officers, or upon a petition, signed by at least fifteen per cent of the taxpaying citizens and the voters representing at least two-thirds of the townships of any county in this state asking that such proposition be submitted, at a special election, the county court shall call the special election for the submission of such proposition within ninety days from the filing of such petition: Provided, such special election shall not be held within ninety days of any general election. The county court shall give notice of such election by publishing the same in some newspaper published in the county. Such notice shall be published for at least two consecutive weeks, the last insertion to be within ten days next before such election, and such other notice may be given as the court may deem proper. The proposition so submitted shall be printed on the ballots in the following form: 'For county highway engineer law,' 'Against county highway engineer law,' with the direction 'Mark out the clause you do not favor.' If a majority of those voting at such election upon the proposition vote for the county highway engineer law, then this article shall remain in full force and effect in such county, but if a majority of those voting at such election upon the proposition vote against the county highway engineer law, then this article and the provisions of the law relating to the appointment and duties of a county highway engineer shall not be enforced in such county."

Section 8669, R. S. Missouri, 1939, further provides that if a majority of the qualified voters at an election provided for in Section 8668, supra, vote against the county highway engineer law, the county surveyor shall be ex officio county highway engineer, and prescribes what his duties and salary shall be thereafter, which, to say the least, is indicative to the writer that under any circumstances the county surveyor will be ex officio highway engineer, even though the majority of the vote is against the county highway engineer law. About the only difference is that his salary as such ex officio county highway engineer is changed. However, in view of *State v. Johnson*, supra, we seriously doubt if the provisions of Sections 8668 and 8669, supra, are applicable to counties having 20,000 and not more than 50,000 inhabitants, for the reason the county highway engineer law did not apply when it came to removing him for dereliction of duty, but applied only to the appointment of a county highway engineer, and not as ex officio county highway engineer, and, further, the last proviso in Section 8660, supra, by the use of the word "shall" makes it mandatory that the county surveyor in counties having 20,000 and not more than 50,000 inhabitants shall also be ex officio county highway engineer, and for the further reason that said amendment to Section 8660, whereby the county surveyor shall be ex officio county highway engineer, is a later enactment than Sections 8668 and 8669, supra.

Usually the use of the word "shall" indicates a mandate. (See *State ex rel. Stevens v. Wurdeman*, 246 S. W. 189, 295 Mo. 566; *Ex parte Brown*, 297 S. W. 445.)

It has been frequently announced by the courts that in case of an irreconcilable conflict in statutes, the latter enactment will prevail. As stated in *State ex rel. v. Gideon*, 273 Mo. 79, 1. c. 87:

"The law is well settled that where there is a irreconcilable conflict between two different parts of the same act, as a rule the last in order of position will control unless there is some special reason for holding to the contrary, which does not exist in this case. The authorities so holding are numerous. * * *"

In *Spurlock v. Wallace et al.*, 204 Mo. App. 674, the court in holding that the county court may order warrants drawn to road overseers without first having received the approval of the county surveyor or ex officio county highway engineer, where the county voted not to have a county highway engineer and abolish such office, said, l. c. 678:

"If the contention made by appellant should be upheld, then we must necessarily hold that to vote under section 10571, and to thereunder abolish the highway engineer act, meant simply a change of the manner and amount of compensation to be paid to the party acting as highway engineer, as the appellant is contending that he is duty bound to perform exactly the same service that the highway engineer would have performed even though the people have voted out this law. We cannot lend sanction to this narrow construction, as it would appear that the purpose of sections 10571 and 10572, Revised Statutes 1909, was to permit the people of a county to abolish the office of highway engineer yet to leave it possible for the surveyor to perform the duties that the highway engineer would have performed had the law not been voted out, provided he acted under the orders and direction of the county court. The general intent of section 10571 was to permit the people of a county to vote out a highway engineer and to abolish the duties of such engineer, and that more was intended by said section than to merely give them the right to change the form and amount of compensation."

This indicates that the court did not agree with the appellant that a vote under Section 10571 (which is practically the same as Section 8668, supra) to abolish the highway engineer meant simply a change in manner and amount of compensation to be paid the party acting as county highway engineer, but that Sections 10571 and 10572 (which are practically the same as Sections 8668 and 8669, supra) were enacted to permit a county to abolish the office of county

September 21, 1944

highway engineer and let the county surveyor perform said duties of said county highway engineer, and also to perform such service as ordered by the county court.

Apparently, Section 8660, as amended by the 60th General Assembly, and Sections 8668 and 8669, R. S. Missouri, 1939, are irreconcilable, but even if these statutory provisions could be harmoniously construed so as to give all parts thereof some reasonable construction, under Section 8669, supra, the county surveyor would become ex officio county highway engineer, with a salary as provided by Section 8669, supra, in addition to those fees he is entitled to receive as county surveyor. However, we are of the opinion that since these provisions cannot all be reconciled, and furthermore that the amendment to Section 8660, supra, apparently was intended to be an exception which should not be affected by Sections 8668 and 8669, supra, and also being the latest statutory enactment, it must prevail over all other provisions.

CONCLUSION

Therefore, we are of the opinion that Sections 8668 and 8669, R. S. Missouri, 1939, do not apply to the office of county surveyor and ex officio county highway engineer in counties having 20,000 inhabitants and not more than 50,000 inhabitants, as provided in the last proviso of Section 8660, R. S. Missouri, 1939; that the county surveyor in such counties shall also be ex officio county highway engineer and be entitled to the salary determined by the county court for his services as ex officio county highway engineer, as provided in Section 8660, supra.

Respectfully submitted

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

VANE C. THURLO
Acting Attorney General

ARH:HR

COUNTY COURT: The county court has jurisdiction to correct taxes extended against exempt property, but no authority to change taxes extended before the property became exempt.

January 15, 1944

FILED

66

1-27
Honorable J. F. Newton
Presiding Judge
County Court of Wright County
Mansfield, Missouri

Dear Sir:

We are in receipt of your letter of January 4th, requesting an opinion from this department. Your letter reads as follows:

"January 5, 1943, a Mr. Wallen sold the first baptist church of Mansfield a residence property to be used as a parsonage, he did not guarantee the payment of the 1943 taxes.

"Now comes the church and asks that the 1943 tax be relieved would the court be within their rights in doing this."

Sec. 6, Article X, Constitution of Missouri, provides:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the

buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable, also, such property, real or personal, as may be used exclusively for agricultural or hori cultural societies: Provided, that such exemptions shall be only by general law."

Section 10937, R. S. Mo., 1939, in so far as is pertinent to this question, reads as follows:

"The following subjects are exempt from taxation; * * * * * sixth, lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distance from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable, shall be exempted from taxation for state, county, or local purposes."

Assuming that a parsonage is exempt from taxation and that a tax has been extended against it, then the county court would have authority to correct the error under section 11114, R. S. Mo., 1939.

It appears from your letter though that the tax here had been extended against this property before its use had changed and while it was still owned and used privately. In this event the lien for taxes has attached and the tax would have to be paid, even though the use of the land now makes it exempt. (Cooley on Taxation, Volume 2, paragraph 712, page 1499.)

CONCLUSION

In our opinion the county court would have no authority to disturb taxes extended before the property was used as a

Hon. J. P. Newton

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1-15-44

parsonage, but if the parsonage is exempt from taxation and a tax is extended against it, then the county court may correct the error.

Respectfully submitted,

RALPH C. LASHLY
Assistant Attorney-General

APPROVED:

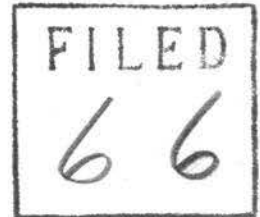
ROY McKITTRICK
Attorney-General

RCL:ML

COUNTY COURT: County Clerk cannot designate a judge to be presiding judge under Section 2493, R. S. 1939, when the duly elected presiding judge is present.

January 20, 1944

2-79



Hon. J. F. Newton
Presiding Judge
County Court
Wright County
Mansfield, Missouri

Dear Judge Newton:

The Attorney-General wishes to acknowledge receipt of your letter of January 18, 1944, in which you request an opinion of this department. This opinion request, omitting caption and signature, is as follows:

"Could Sec. 2493 be construed in such a manner as to give the County Clerk the authority to designate one of the associate judges as presiding, in the presence of the presiding judge and one associate judge?"

The section of the statutes, namely, Section 2493, R. S. Mo. 1939, which you mention in your letter, provides the following:

"A majority of the judges of the county court shall constitute a quorum to do business; a single member may adjourn from day to day, and require the attendance of those absent, and when but two judges are sitting and they shall disagree in any matter submitted to them, the decision of the presiding judge at the time being, to be designated by the clerk of such court, shall stand as the judgment of the court."

Your request deals with the problem of the county clerk appointing or designating one of the two judges present

as the presiding judge when one judge is absent. However, one of the judges present in your state of facts is the duly elected, qualified and acting presiding judge of the county court. Of course, you are familiar with the section of the statutes which specifies in what manner a presiding judge of the county court shall be elected. However, for the purposes of this opinion, we will cite such section, which is Section 2475, R. S. Mo. 1939, and which provides the following:

"At the general election in the year eighteen hundred and eighty, and every two years thereafter, the qualified voters of each of said districts shall elect a county court judge, who shall hold his office for a term of two years and until his successor is duly elected and qualified; and at the general election in the year eighteen hundred and eighty-two, and every four years thereafter, the presiding judge of said court shall be elected by the qualified voters of the county at large, who shall hold his office for the term of four years and until his successor is duly elected and qualified. Each judge elected under the provisions of this article shall enter upon the duties of his office on the first day of January next after his election."

It will be noted that the above section of the statutes provides that the Legislature has specifically designated that the presiding judge of a county shall be elected by the qualified voters of the county at large. Consequently, if our opinion to your question should be answered in the affirmative and hold that the county clerk has a right to designate one of the two judges as the presiding judge to transact business in the county court when the duly elected presiding judge is present, it would necessarily mean that the county clerk of the county would have authority to divest the presiding judge of his powers as presiding judge and designate an associate judge of the county to be the presiding judge. It is our opinion that this statute does not authorize the county clerk to execute any such power.

Section 2493, supra, was in its original form enacted in 1825 and has been on the statute books of this State since

that time. It has been changed slightly since it was originally passed but, as a whole, the statute has remained about the same. Of course it is a rule of law that in the construction of statutes the person construing such statute should attempt to arrive at the intention of the Legislature in passing the particular provision in question. *Thompson v. City of Lamar*, 17 S. W. (2d) 960, 322 Mo. 514; *City of St. Louis v. The Senter Commission Company*, 85 S. W. (2d) 21, 337 Mo. 238; *Graves v. Purcell*, 85 S. W. (2d) 543, 337 Mo. 574.

We feel that the intention of the Legislature in passing such a provision was to enable a county court to transact business when one of the judges was absent, and that in view of the fact there would be only two judges and that there might be the possibility of a tie vote on some matter presented to them, that the giving to the presiding judge of the power to override the vote of the other judge was for the purpose of permitting the two judges to arrive at some definite judgment. However, we do not feel that this section of the statute was passed by the Legislature with the intention that the county clerk would be able to divest the presiding judge, who was present, of his authority and appoint another judge in his stead to act as presiding judge. Our opinion in this matter necessarily means that we feel that Section 2493, *supra*, in speaking of but two judges sitting, means two associate judges. It appears clear that if two associate judges are sitting and the presiding judge is absent, that the county clerk under this statute has authority to designate one of such judges as the presiding judge in order that the business of the county may be transacted. However, we do not feel that he has such power where the presiding judge, who has been duly elected by the people in the county, is present.

Conclusion

Therefore, it is the opinion of this department that Section 2493, R. S. Mo. 1939, cannot be construed in such manner as to give the county clerk the authority to designate one of the associate judges as presiding judge in the presence

Hon. J. F. Newton

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January 20, 1944

of the presiding judge and one associate judge.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

COUNTY JUDGE - COMPENSATION: Single county judge who appears, to act as member of court at times provided by law, is entitled to compensation.

March 28, 1944



Honorable J. F. Newton
Presiding Judge
Wright County Court
Mansfield, Missouri

Dear Mr. Newton:

This is an acknowledgment of your enquiry of March 20, 1944, which is as follows:

"In case where any one of the three judges of the county court is in attendance on any regular or called term of said court, with the other two absent can the one present legally claim attendance and be paid for the day."

Section 2485, R. S. Mo., 1939, is in part as follows:

"Four terms of the county court shall be held in each county annually, at the place of holding courts therein, commencing on the first Mondays in February, May, August and November. The county courts may alter the times for holding their stated terms, giving notice thereof in such manner as to them shall seem expedient:***."

Section 2493 thereof is in part as follows:

"A majority of the judges of the county court shall constitute a quorum to do business; a single member may adjourn from day to day, and require the attendance of those absent:***."

Section 2494 thereof is in part as follows:

"***In all counties of this state now or hereafter having less than seventy-five thousand inhabitants, the judges of the county court

shall receive for their services the sum of five dollars per day for each day necessarily engaged in holding court. In addition to the salaries herein authorized to be paid to judges of the county court in counties having seventy-five thousand inhabitants or more, and in addition to the per diem herein authorized to be paid to the judges of the county court in counties having less than seventy-five thousand inhabitants, said judges shall receive five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court: Provided, that in all counties now or hereafter having a population of twenty thousand inhabitants or less such mileage shall be charged only once for each regular term and such mileage shall not be charged over eight times per year for special or adjourned terms. (R. S. 1929, Section 2092, Re-enacted, Laws 1931, p. 190; Reenacted, Laws 1933, p. 204; Reenacted, Laws 1939, p. 332.)

In the case of Nodaway County v. Kidder, 129 S.W.2d 857, 344 Mo. 795, 801, the Supreme Court held:

"The compensation of a judge of the county court, in a county having less than 75,000 inhabitants is fixed at \$5 per day for each day necessarily engaged in holding court, plus five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court, and such mileage shall be charged only once for each regular term. (Sec. 2092, R. S. 1929 (Mo. Stat. Ann., sec. 2092, p. 2664), as amended Laws of Mo. 1931, pp. 190-191.) In addition a judge of the county court is allowed \$5 per day for each day he sits as a member of the board of equalization and board of appeals. (Sec. 9818, R. S. 1929 (Mo. Stat. Ann., sec. 9818, p. 7915).)

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous,

March 28, 1944

unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. (State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S. W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.)

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. (State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645.)"

Section 2485 supra provides the time for holding court and at such time each judge should be present. Under the provisions of Section 2493 supra, if only one judge were to appear, he would have the power to "adjourn from day to day, and require the attendance of those absent". The performance of such acts would be in a judicial capacity.

Therefore, it is the opinion of this department that when a single member of a county court appears for the purpose of acting in a judicial capacity at such times provided in Section 2485 supra and Section 2487, R. S. Mo., 1939, relating to special terms of the County Court, and Section 2493 supra, he is entitled to the compensation in the manner provided in Section 2494 supra.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED

ROY MCKITTRICK
Attorney General

Fees - Probate Judges: Probate Judges are entitled to fees for certifying to assessors lists of administrators and may retain same if it is in excess of salary.

July 14, 1944.



Hon. Ralph B. Nevins
Prosecuting Attorney
Hickory County
Hermitage, Missouri

Dear Mr. Nevins:

We have your request for an official opinion, dated July 8, 1944, which is as follows:

"Would like an opinion on the following:

"Is the Probate Judge entitled to charge a fee for certifying list of estates to the assessor, as required by Section 10957, and if so, is he entitled to retain the fee?"

Section 10957, R. S. Mo. 1939, provides in part as follows:

"It shall be the duty of every judge of the probate court in each county in this state to certify to the county assessor, on the first Monday of June in every year, a written list of every administrator, executor and guardian, and of every other person legally in charge and control of any estate in the probate court; * * *"

Section 13404, R. S. Mo. 1939, provides in part as follows:

"The judges of probate courts, respectively, shall be allowed fees for their services as follows: * * *

"For copying any order, or record or paper, not herein provided for, for every hundred words and figures..... 10¢ * * *

"For every certificate and seal..... 50¢ * * *"

The duty of the probate judge to make the list is set out above and the fee which he is to receive is also definitely set out. The rule as stated in the case of Smith v. Pettis County, 136 S.W. (2d) 282, L.C. 285, is as follows:

"The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against the officer. *Nodaway County v. Kidder*, Mo. Sup., 129 S.W. (2d) 857; *Ward v. Christian County*, 341 Mo. 1115, 111 S.W. (2d) 182."

Your second question as to whether or not the probate judge would be entitled to retain the fee collected by him as provided above is answered by Section 13404, Laws of Missouri, 1943, page 8681, which is in part as follows:

"The Judges of the Probate Courts in counties which now have or may hereafter have a population of less than 19,000 inhabitants shall receive for their services annually, to be paid out of the County Treasury in equal monthly installments at the end of each month by a warrant drawn by the County Court upon the County Treasury minimum salaries as follows: In counties having 10,000 inhabitants or less, the sum of \$750.00; * * *

"but should the yearly sum of fees earned and collected by any Probate Judge of any such county, and his clerk or clerks, by virtue of the office, exceed the amount which such Judge would be entitled to receive by reason of the population of said county as aforesaid, then such judge shall be entitled to retain the excess subject to the limitations set out in Section 13404 of Article 2, Chapter 99, Revised Statutes of Missouri, 1939, and the County Court shall draw a warrant or warrants upon the County Treasurer in favor of such Judge for such excess fees."
(Underscoring ours)

CONCLUSION

It is therefore the opinion of this office that the probate judge of Hickory County shall be entitled to the sum of 10¢ per hundred words or figures for each list made out by him as provided for in Section 10957, R. S. Mo. 1939, and the further sum of .50¢ for

July 14, 1944.

making the certificate as therein provided.

It is further the opinion of this office that inasmuch as Hickory County has a population of less than 10,000 inhabitants the probate judge can only retain the above fee in the event that the total fees collected by him exceed the sum of \$750.00 as provided in Section 13404a, Laws of Missouri, 1943.

Very truly yours

GAYLORD WILKINS
Assistant Attorney General

APPROVED:

ROY MCKITTRICK

GW.sc

RECORDERS -- DUTIES AS TO CHATTEL MORTGAGES:

It is not necessary that a certificate of title be presented at the time a chattel mortgage on an automobile is recorded.

July 28, 1944.



Mr. Chas. A. Neumann
Chief Deputy Recorder
City of St. Louis
St. Louis, Missouri

Dear Mr. Neumann:

This is to acknowledge your request for an official opinion, dated July 17, 1944, which is as follows:

"We would like to have your ruling on this question of Chattels.

"Is it legal to file a chattel on an automobile, and then later, say four or six weeks, come in to certify same?

"It is our thought that the title should be presented at the time of filing of chattel.

"Awaiting your early reply, and thanking you in advance, we are,
* * "

Section 3488, Laws of Missouri, 1941, page 329, reads as follows:

"Certification of filing chattel mortgage on motor vehicles -- release, fee, certain exemptions. -- It shall be the duty of the recorder of deeds, on request of the mortgagee, or his assignee, to certify on the certificate of title to the mortgaged motor vehicle, that such chattel mortgage has been filed showing the date, the amount of the mortgage and the name of the payee. When such chattel mortgage

July 28, 1944.

is released it shall be the duty of the recorder to so show on the certificate of title. For services herein provided the recorder shall receive a fee of twenty cents (20 Cts.). A mortgage on a motor vehicle shall not be notice to the whole world, unless the record thereof is noted on the certificate of title to the mortgaged motor vehicle, as herein provided. Provided, however, that the provisions of this section shall not apply to chattel mortgages given to secure the purchase price or any part thereof or to a motor vehicle sold by the manufacturer or their distributing dealers, or to a chattel mortgage given by dealers to secure loans on the floor plan stock of motor vehicles."

It can be seen from the above that it is "legal" to file a chattel mortgage on an automobile irrespective of whether or not the title is presented at the time. The statute is plain in its meaning wherein it says: "on request of the mortgagee, or his assignee."

It is the recorders duty to file the chattel upon the same being presented and the fee being paid. If the mortgagee or his assignee does not request a certification of the title, it does not preclude the recorder from filing the chattel.

It follows, therefore, that it makes no difference when the mortgagee, or his assignee, makes the request for the certification.

The statute is somewhat peculiar in that it specifically provides that the section will not apply to chattel mortgages given to secure a purchase price of a motor vehicle sold by a manufacturer or distributing dealer.

This section has been interpreted once in this state in the case of Interstate Securities Co. V. Barton, 153 S.W. (2d) 393, in which case the court construed the statute in the following words, l.c. 396:

"Section 8382, R. S. Mo. 1939, Mo. St. Ann. Sec. 7774, p. 5193, and particularly the proviso at the close of paragraph (c) thereof, provides the method by which the purchaser of a new car secures his certificate of title; but no mention is made relative to recording liens or encumbrances on the certificate of title to a new car; nor does the statute, anywhere, provide that a chattel mortgage given for the purchase price of a new car, from a dealer, shall not give notice to the world unless the recorder or any one else enters a memorandum on the certificate of title of the existence of such mortgage. In the case of Vetter v. Browne, 231 Mo. App. 1147, 85 S.W. 2d 197, it is expressly held that liens or encumbrances referred to in paragraph (c) applies only to used or second-hand automobiles.

"It has also been held in a case analogous in some respects to the case at bar, that a finance company, in a suit to replevin an automobile, may recover although the transaction between the parties to the sale of such automobile was void from the fact that there was a failure to comply with the provisions of Section 7774, R. S. Mo. 1929. Mo. St. Ann. Sec. 7774, p. 5193, said section appearing as Section 8382, R. S. Mo. 1939, and in substantially the same language, assuming that plaintiff had no notice of failure to deliver a certificate of title or of any infirmities therein. National Bond

July 28, 1944.

& Investment Co. v. Miller, Mo. App.,
76 S.W. 2d 703.

"Since we hold that Section 3488, supra, does not apply to mortgages given to a dealer to secure the purchase price of a new automobile, the same being exempt by the proviso at the close of said Section, the proper filing of such mortgage with the Recorder of Deeds in the proper county, gives notice to the world of its existence under the provision of Section 3488, R. S. Mo. 1939, Mo. St. Ann. Sec. 3097, p. 1919." * * *

CONCLUSION

It is therefore the opinion of this office that it is legal to file a chattel mortgage on a motor vehicle without presenting the title for certification at the time the mortgage is filed. It is further the opinion of this office that in the case of chattel mortgages filed by manufacturers or their distributing agents, the mortgage so filed notwithstanding the fact that the title has not been certified, is notice to the world in the same manner as any other chattel mortgage.

Respectfully submitted

GAYLORD WILKINS
Assistant Attorney General

APPROVED:

ROY McKITTRICK

GW.sc

RECORDER OF DEEDS:

As a compensation for making and preserving direct and inverted indexes only a fee of ten cents shall be collected for each instrument affecting real estate recorded.

January 20, 1944

FILED

67

Honorable Robert V. Niedner
Prosecuting Attorney
of St. Charles County
Courthouse
St. Charles, Missouri

Dear Mr. Niedner:

This will acknowledge receipt of your letter of January 13, 1944, wherein you requested an opinion from this Department. Your opinion request read as follows:

"I have another request for an opinion concerning the matter in which the Recorder of Deeds in St. Charles County and the Office of the United States Attorney for the Eastern District, Eastern Division of Missouri, have been having a controversey. I want to say first that I very much appreciate your cooperative attitude in furnishing the opinions for which I have been asking, and I want to assure you that I have been making some study of the problems myself before requesting an opinion and have tried to restrict my requests for opinions to those situations where I do not find an adequate statutory or reported case law. The opinion for which I am asking in this letter is being requested by the Recorder of Deeds and concerns the interpretation of Section 13426 of the Revised Statutes of Missouri for 1939.

"Our Recorder of Deeds wants to know whether the provision of that section

"In addition to the above fee for recording deeds they shall be allowed for recording every such instrument relating to real estate a fee of 10¢ as a compensation for making and preserving direct and inverted indexes to every book containing deeds affecting real estate.

Honorable Robert V. Niedner

January 20, 1944

means that whether there are 2 parties or 40 parties to a deed he is entitled only to 10¢ for the work of indexing involved in recording the entire deed, or whether under that section he is entitled to 10¢ per name for the indexing.

"A great many deeds have been submitted for recording which bear as many as 45 signatures to which the United States of America is a party and land owners in this County are the other parties. It has been the long standing practice of the Office of the Recorder of Deeds to charge 10¢ per name for indexing so that the cost of indexing the ordinary instrument in which there are 2 parties would be 20¢. In the case of the deeds in question, however, the charge for indexing that was made was around \$4.50 and the United States Attorney's Office objected and insisted on wanting to pay merely 10¢ for the entire amount of indexing involved. I have felt also that the Recorder should be entitled to 10¢ for making each index. However, it seems to me that Section 13426 is somewhat ambiguous on this point. Would you please advise us of what your office thinks about this."

Section 13426 R. S. Mo. 1939, reads as follows:

"Recorders shall be allowed fees for their services as follows:

For recording every deed of instrument,
for every hundred words.....\$0.10
In addition to the above fee for recording
deeds, they shall be allowed for recording
every such instrument relating to real
estate, a fee of ten cents, as a compensa-
tion for making and preserving direct and
inverted indexes to every book containing
deeds affecting real estate.
For every certificate and seal..... .50
For recording a plat of survey, if not
more than six courses..... .40
For every course above six of the same .02
For copies of plats, if not more than
six courses..... .40
For every course above six..... .02

Honorable Robert V. Niedner

January 20, 1944

Now turning to the interpretation of that portion of Section 13426 R. S. Mo. 1939, which reads:

"In addition to the above fee for recording deeds, they shall be allowed for recording every such instrument relating to real estate, a fee of ten cents, as a compensation for making and preserving direct and inverted indexes to every book containing deeds affecting real estate."

It will be noted from reading the above portion supra, that the first sentence reads: "In addition to the above fee for recording deeds (comma)". Of course this portion is clear and not ambiguous. Then it will be noted that it is provided that: (meaning the Recorder of Deeds) "shall be allowed for recording every such instrument relating to real estate," this portion is clear and unambiguous and restricts the hereinafter fee specifically to instruments relating to real estate. Then it will be noted that; set off in commas, is the statement, "a fee of ten cents,". Applying the definition to the punctuation we quote from 15 C.J.S., page 246 as follows:

"COMMA. In punctuation, a 'comma' has been defined as a point (,) used to mark the smallest structural divisions of a sentence, or a rhetorical punctuation mark indicating the slightest possible separation in ideas or construction. 'Comma' has been compared with, and distinguished from, 'semi-colon.'"

Then following the comma after the word "cents" we find this statement: "as a compensation for making and preserving direct and inverted indexes to every book containing deeds affecting real estate."

It is our view in placing the correct interpretation upon the whole portion above set forth, taken from Section 13426 R. S. Mo. 1939, that under the rules of statutory construction we must give every word its usual and ordinary meaning and read the whole paragraph together in order to arrive at the intent and meaning of said portion of the statutes.

111 S. W. (2d) 513, 342 Mo. 75;

"Every word of statutes must be given some meaning if possible."

Bess vs. Schult, 143 S. W. (2d) 486.

Honorable Robert V. Nidener

January 20, 1944

Therefore, we are driven to the conclusion that the fee of 10¢ is to be the total compensation provided to the Recorder of Deeds for making and preserving direct and inverted indexes in one or all of the several books where such instrument shall be indexed. We are mindful of the contention set forth in the opinion request but we are at loss to find any reason or rule of statutory construction which would enable us to hold that the phrase "a fee of ten cents" should be taken to mean that it should be applied to each individual name contained in the instrument relating to real estate, and we are constrained to hold that the fee of ten cents is a total compensation for preserving direct and inverted indexes for the particular piece of real estate described in the recorded instrument.

CONCLUSION

It is the opinion of this Department that under Section 13426 R. S. Mo. 1939, a Recorder of Deeds is entitled to charge only the sum of ten cents as a compensation for making and preserving direct and inverted indexes to every book containing deeds affecting real estate.

Respectfully submitted,

B. Richards Creech
Assistant Attorney-General

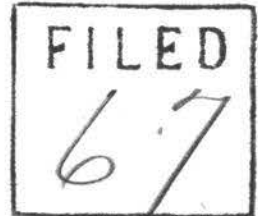
APPROVED:

ROY McKITTRICK
Attorney-General

BRC:lr

Fees -- Constables: Constables shall collect fees as provided under Section 13399, Laws of Missouri, 1943, for serving process in criminal cases.

July 10, 1944.



Hon. Robert V. Niedner
Prosecuting Attorney
St. Charles, Missouri

Dear Mr. Niedner:

We have your request for an official opinion of this office, dated July 5, 1944, which reads as follows:

"I have been attempting to resolve the various sections of the Statute relating to the fees of constables for the purpose of rendering an opinion on how much mileage a constable may be entitled to for serving subpoenas and other process in criminal cases in Justice Courts.

"Section 13399, R. S. Mo. 1939, gives him ten cents per mile for each mile actually travelled in serving any process; however, Section 13414 seems to limit mileage to situations where the place to which the constable travels is more than five miles from the place where the Court is held. That seems also to be the meaning of Section 13411 as that pertains to Sheriffs.

"The constables in this county have been claiming fees in accordance with Section 13399 and I am wondering whether Section 13414 limits Section 13399.

"I would appreciate your opinion with regard to these apparent discrepancies."

Section 13399, Laws of Missouri, 1943, page 872 provides in part as follows:

"Constables shall be allowed fees for their services as follows: * * *

"And for every mile traveled in taking a criminal to jail and returning therefrom, provided the distance so traveled be more than five miles, the sum of, per mile***.....\$.10

"For each mile actually traveled in serving any process.....\$.10

Section 13414, R. S. Mo. 1939, provides as follows:

"Mileage of sheriffs, county marshals and other officers in certain cases. -- Sheriffs, county marshals or other officers shall be allowed for their services in criminal cases and in all proceedings for contempt or attachment as follows: Ten cents for each mile actually traveled in saving (serving) any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held: Provided, that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip." (Parenthesis ours)

When there is an apparent conflict between two statutes as in this case the general rule in construing such statutes is that the special statute shall govern over the general statute. It is further ruled that the last statute in point of order should have preference.

In the case of State ex rel. Brotherhood of American Yeomen v. Reynolds et al., 229 S.W. 1057, 1.c. 1058, the rule was stated as follows:

"A familiar rule of construction frequently recognized by this court is that the general provisions of a statute must yield to special provisions where there is a conflict and where the general provisions in one part of the statute are inconsistent with the more specific provisions in another part. State ex rel. Garesche v. Roach, 258 Mo. loc. cit. 552, 167 S.W. 1008."

In the late case of Jacoby v. Missouri Valley Drainage District, 163 S.W. (2d) 930, 1.c. 938, Judge Leedy summed up the rules for statutory construction as follows:

July 10, 1944.

"The rules of statutory construction applying in such a situation are as follows:

"The law is well settled that, where there is an irreconcilable conflict between two different parts of the same act, as a rule the last in order of position will control, unless there is some special reason for holding to the contrary.' State ex rel. Greene County v. Gideon, 273 Mo. 79, 87, 199 S.W. 948, 949.

"Where general terms or expressions in one part of a statute are inconsistent with more specific or particular provisions in another part the particular provisions must govern, unless the statute as a whole clearly shows the contrary intention and they must be given effect notwithstanding the general provision is broad enough to include the subject to which the particular provisions relate.' 59 C.J. Section 596, p. 1000.

"Where one part of the statute is susceptible of two constructions, and the language of another part is clear and definite, and is consistent with one of such constructions, and opposed to the other, that construction must be adopted which will render all clauses harmonious.' 59 C.J. Section 597, p. 1103."

Bearing the above rules of construction in mind, it is also the rule in this state that fee statutes must be strictly construed against the officer collecting them. That rule is stated in the case of Smith v. Pettis County, 136 S.W. (2d) 282, 1.c. 285, as follows:

"The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against the officer. Nodaway County v. Kidder, Mo. Sup., 129 S.W. (2d) 857; Ward v. Christian County, 341 Mo. 1115, 111 S.W. 2d 182."

CONCLUSION

It is therefore the opinion of this office that Section 13399, Laws of Missouri, 1943, is a special statute, particularly limiting Section 13414, R. S. Mo. 1939, and that constables in St. Charles Township should receive fees for serving process

July 10, 1944.

in criminal cases as provided in Section 13399, supra.

Very truly yours,

GAYLORD WILKINS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

GW:sc

MISSOURI LIBRARY : The Missouri Library Commission
COMMISSION : may receive gifts of money, books
TRUST : or other property, which may be
: used or held in trust for the
: purposes given by the person
: Creating said trust.

January 24, 1944



Miss Ruth O'Malley
Executive Secretary
Missouri Library Commission
Jefferson City, Missouri

Dear Miss O'Malley:

This office is in receipt of your request for an opinion and omitting caption and signature, your request reads as follows:

"I am attaching herewith a copy of Article II, Section 14731-14736 pertaining to the Missouri Library Commission and wish to ask your opinion on a point of law in regard to one of its sections.

"Section 14732 provides among other things as follows:

'It may also receive gifts of money, books or other property which may be used or held in trust for the purpose or purposes given.'

"Is this sufficient provision to enable the Commission to receive a bequest through the will of a citizen of Missouri for the purpose of extending library service."

Proceeding with our examination of the statutes devoted to the duties of the Missouri Library Commission, we find the following; section 14732 reads as follows:

"The commission shall give advice to all schools, free and other public libraries, and to all communities which may propose to establish them, as to the best means of establishing and maintaining such libraries, the selection of books, cataloguing and other details of library management. It may also receive gifts of money, books,

or other property which may be used or held in trust for the purpose or purposes given; may purchase and operate travelling libraries, and circulate such libraries within the state among communities, libraries, schools, colleges, universities, library associations, study clubs, charitable and penal institutions, free of cost, except for transportation, under such conditions and rules as shall protect the interest of the state and best increase the efficiency of the service it is expected to render the public. It may publish such lists and circulars of information as it shall deem necessary, and it may also conduct summer schools of library instructions, and a clearing house for periodicals for free gift to local libraries."

We find the above section to be clear, concise, and unambiguous and in need of no construction on our part.

We find that the constitutionality of this section has not been questioned, and the same remains in effect, and it has not been modified or overruled by any decisions in this state. That portion of the section useful for the purpose of our discussion is this: "It, (the Commission) may also receive gifts of money, books or other property which may be used or held in trust for the purpose or purposes given." This sentence means exactly what it says. That the Commission has now the constitutional right and may receive gifts of money, or other property, which may be used or held in trust. The person creating the trust may impose certain terms or conditions which are binding on both the trustee and Commission.

CONCLUSION.

It is the opinion of this department that the Missouri Library Commission may receive gifts of money, books or other property, which may be used or held in trust for the purpose given by the person creating said trust.

Respectfully submitted,

APPROVED:

L. I. MORRIS
Assistant Attorney General

ROY McKITTRICK
Attorney General

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2 ✓
COUNTIES. : Abolition of township organization
: creates vacancy in office of county
: collector, which is filled by the
: Governor.
:

October 11, 1944

Mr. Hubert T. Perry
Treasurer and Ex-Officio Collector
of Carroll County
Carrollton, Missouri

10/11 ✓
FILE

70

Dear Sir:

This will acknowledge the receipt of your letter of October 6, requesting an opinion of this office, which is as follows:

"I am Treasurer and Ex-officio Collector of Carroll County, which is under Township organization and I am running for re-election in November to this same office. At this same November election a vote will be taken upon the proposition to abolish Township organization. Should the proposition carry, I would like to know what effect there will be on my office in the event I am re-elected for the ensuing four years. Would I assume the duties of Collector or would an election be required to select a Collector?

"I will appreciate your early advice."

Section 14023, R. S. Missouri, 1939, provides:

"At any general election holden in this state, in any county having adopted township organization under this chapter, upon the petition of one hundred voters of the county, praying the county court to resubmit the question of township organization to the voters at said election, it shall be the duty of the county court to submit the question again at such election, in like manner as provided in article 1 of this chapter; and if it shall appear, after the canvass of the votes as provided in article 1 of this chapter, that a majority of all the votes cast upon that question shall be against township organization,

then township organization shall cease in said county; and all laws in force in relation to counties not having township organization shall immediately take effect and be in force in such county. " (Underscoring ours.)

Section 13989 provides:

"The county treasurer of counties having adopted or which may hereafter adopt township organization shall be ex officio collector, and shall have the same power to collect all delinquent personal property taxes, licenses, merchants' taxes, taxes on railroads and other corporations, the delinquent or nonresident lands or town lots, and to prosecute for and make sale thereof, the same that is now or may hereafter be vested in the county collectors under the general laws of this state. The ex officio collector shall, at the time of making his annual settlement in each year, deposit the tax books returned by the township collectors in the office of the county clerk, and within thirty days thereafter the clerk shall make, in a book to be called the "back tax book," a correct list, in numerical order, of all tracts of land and town lots which have been returned delinquent by said collectors, and return said list to the ex officio collector, taking his receipt therefor."

Under Sec. 14023 supra, as soon as township organization was abolished all the laws relating to counties not having township organization shall immediately take effect. These laws require a county collector and county assessor as separate and distinct offices. The county treasurer is ex officio collector only in counties under township organization. (See 13,989 supra.) As soon as township organization is abolished the county treasurer ceases to be ex officio collector.

A similar situation to the one here, was considered in the case of State ex inf. John T. Barker v. H. I. Dusean et al. 265 Mo. 26 and the court stated:

Mr. Hubert T. Perry

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Oct. 11, 1944

"Not to pursue the matter further, we are of the opinion that the result of the election held in Butler County in November 1914, was to discontinue township organization that respondents, Barnhill, Harwell, Osborn, Reading, Kearby, Gardner, Ratcliff, Deaton, Burger, and Phillips were thereby divested of authority to act as ex-officio collector of the revenue of said Butler county, and as collector of the several townships therein respectively * * *."

"* * * The 'laws in force in relation to counties not having township organization' which laws as we see the constitution automatically applied to Butler County provided at the time of the accrual of this vacancy and at the time the Governor filled it and now provide that as to an office like this, such vacancy shall be filled by appointment by the Governor.'"

CONCLUSION.

It is therefore, the opinion of this office that where a county abolishes township organization, a vacancy is created in the office of county collector which is filled by the Governor.

Respectfully submitted

ROBERT J. FLANAGAN
Assistant Attorney General

RJF:LeC

APPROVED:

VANE C. THURLO
Acting Attorney General.

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6
PROBATE : Probate Judges of counties now having, or
JUDGE. : which shall hereafter have less than 19,000
: population, shall charge the fee, authorized
: by statute, for each official act performed
: by him as such officer. He shall at the
: end of each month, make and file a report
: with the County Clerk. 1. Of all fees earned
: and collected. 2. All fees earned but not
: collected. The fees collected for (a)
: Solemnization of marriages and (b) Hearing
: and determining inheritance tax matters may
: be retained by the Probate Judge and no
: accounting is required.

January 5, 1944

Honorable Jos. V. Pitts
Judge and Ex-Officio Clerk
Douglas County
Ava, Missouri



Dear Judge Pitts:

Your letter, requesting an opinion in regard to fees collectible by Probate Judges, has been handed to me for attention. Such letter, omitting caption and signature, is as follows:

"I wrote to you last week in re. Report to Co. Court & turning over fees-- No reply & I presume you are getting Atty. General's opinion.)

"Well to-day I commenced keeping account of every item of work & at 5:00 I have cared for 1 Transfer of Title .25

4 Affidavits of Draftees for deferment.

"I have been all along caring for Affidavits for Dependency Benefits-- Deferment Affidavits-- Some months I am sure I have cared for 100 items of such "Free work."

"Question- Under the new setup wherein I am on a "Salary" and my earnings are to be turned over to our County.

"Will I be permitted to do this 'Free work' or will I be charged up with it & required to account for it out of my own pocket.

"I cannot afford to account for each seal & Ctf. .50¢, when I do the work for nothing.

"Our Auditor now here (Ed Hill & Walter Back) give it as their opinion that technically I

Jan. 5, 1944

could be charged up with any work I do under my Probate Seal & could be required to turn the fees over to County.

"Please include answer to this question, when you answer my former questions."

A probate Judge must rely entirely upon statutory authority for the collection of his fees, and he has no common law right thereto. This thought is sustained in numerous decisions and from one we quote:

"The rule is established that the right of a public official to compensation must be founded upon a statute. It is equally established that such a statute is strictly construed against the officer."

Nodaway Co. v. Kidder, 129 S. W. (2d) 857
Ward V. Christian County, 111 S. W. (2d) 182

In looking to the Statutes which concern the fees allowed to Probate Judges we find that at Section 13398 R. S. Mo., 1939, a general provision for the levy and collection of fees in the connection with fee offices. We do not set out this portion because of the extreme length.

Turning to the next section pertaining to the fees of this office, we find that at Section 13404, R. S. Mo., 1939, that the fees of a Probate Judge are established. This section sets out in detail and with great particularity the specific fee allowed for the different services and acts of this official. The portion of the act useful to us in this instance reads as follows:

"*** Provided further, that whenever, after deducting all reasonable and necessary expenses for clerk hire, the amount of fees collected in any one calendar year by or for any one probate judge in any county in this state, during his term of office, and irrespective of the date of accrual of such fees, shall exceed a sum equal to the annual compensation in the aggregate from all sources and for all duties

by virtue of the office, except the \$1,200.00 allowed for expenses when holding circuit court in other counties, provided by law for a judge of the circuit court having jurisdiction in such county, then it shall be the duty of such probate judge to pay such excess less ten per cent thereof, within thirty days after the expiration of such year, into the treasury of the county in which such probate judge holds office, for the benefit of the school fund of such county; and whenever at any time after the expiration of the term of office of any probate judge the amount of fees collected by or for him, irrespective of the date of accrual, shall exceed the sum equal to the aforesaid annual compensation provided for a judge of the circuit court having jurisdiction in such county, it shall be the duty of such probate judge to pay such excess, and all fees thereafter collected by or for him on account of fees accrued to him as such probate judge, less ten per cent thereof, within thirty days from the time of collection, into the county treasury for the benefit of the school fund.***"

Looking now to more recent legislation, which has given some concern to those officers affected, we find that in addition to Section 13404 R. S. Mo., 1939, the 99th Chapter of Art. 2 has been enlarged.

The 62nd General Assembly of Missouri, amended Art. 2, Ch. 99, R. S. Mo., 1939, by adding a new section, which became effective Nov. 22, 1943. This is known as Sec. 13404a and it is devoted to the fees and salaries of Probate Judges in counties which now have or may hereinafter have a population of less than 19,000 inhabitants. In making provisions for the disposition of such fees and salaries the Legislature set a minimum salary to be paid by the County Treasury by a warrant drawn by the County Court.

The annual salary to be paid in monthly installments is fixed upon a population basis, ranging from \$750.00 in counties having 10,000 inhabitants or less to \$2,400.00 in counties having a population of less than 19,000. The full text of the new section, 13404a R. S. Mo., 1939, reads as follows:

"The Judges of the Probate Courts in counties which now have or may hereafter have a population of less than 19,000 inhabitants shall receive for their services annually, to be paid out of the County Treasury in equal monthly installments at the end of each month by a warrant drawn by the County Court upon the County Treasury minimum salaries as follows: In counties having 10,000 inhabitants or less, the sum of \$750.00; in counties having 10,000 inhabitants and less than 15,000, the sum of \$1200.00; in counties having more than 15,000 inhabitants and less than 17,500, the sum of \$2,000.00; and in counties having more than 17,500 inhabitants and less than 19,000, the sum of \$2,400.00; but should the yearly sum of fees earned and collected by any Probate Judge of any such county and his clerk or clerks, by virtue of the office, exceed the amount which such Judge would be entitled to receive by reason of the population of said county as aforesaid, then such judge shall be entitled to retain the excess subject to the limitations set out in Section 13404 of Article 2, Chapter 99, Revised Statutes of Missouri, 1939, and the County Court shall draw a warrant or warrants upon the County Treasurer in favor of such Judge for such excess fees. It is further provided, that all Probate Judges in such counties shall at the end of each and every month after this act shall take effect, make and file with the County Clerk a report of all fees actually collected by him or his clerk during the month, except fees earned and collected for the solemnization of marriages and the hearing and determining of inheritance tax matters, together with a report of all such fees earned during the month but not yet collected, and that he shall at the end of each month pay over to

the County Treasurer all monies collected by him or his clerk during the month which are required to be shown in the monthly report as above provided, taking duplicate receipts therefor, one of which shall be filed with the County Clerk, and every such Probate Judge shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the County Treasury as herein provided. Approved August 4, 1943."

The question as to which census will control in the determination of population upon which the salary of this officer is based becomes important at this point. In the absence of statutory provision the last decennial census would control. Nothing is indicated in the act (Sec. 13404a) as to how we are to determine population. Here is what our court has said on this point.

In State ex rel O'Connor v. Riedel, 46 S.W. (2d) 131, 1. c. 35, we find:

"*** The number of any county shall, for the purpose of this section be ascertained by multiplying the whole number of votes cast at the last preceding presidential election by five, until after the population of such county shall have been ascertained by the next decennial census of the United States.***"

"How are the populations of the counties to be now ascertained? There is no express language requiring a resort to the 'next' or any other decennial census of the United States. But the implication is clear that after the occurrence of the event which puts an end to the further use of the presidential vote method the populations shall be ascertained from the official census of the United States. But which census? One which is obsolete for all except historical or statistical purposes? Manifestly the one at the time in current use for every other practical purpose-- the last one. That which is

implied in a statute is as much a part of it, as what is expressed. 2 Sutherland on Stat. Const. (2d. Ed.) Sec. 500 and cases cited. The contention of the amici curiae cannot be sustained.***"

We have previously discovered that the fees authorized by statute must be collected by the Probate Judge and accounted for by him. And a further report must be made by him for fees earned and collected; also for fees earned but not collected. there are certain fees which the Probate Judge may collect and for which he is not required to account for under the statutes and decisions. We refer to

1. Fees received for solemnizing of marriages.
2. Fees received for hearing and determining inheritance tax matters.

These fees may be retained by the Probate Judge as his own. The authority for retention of these two classes of fees is the new section 13404a which expressly excepts them.

See also Smith v. Pettis Co. 133 SW (2d) 232
State ex rel Jasper Co. v. Gass
296 SW 431.

While not specifically raised in your opinion request, certain points should be included in our discussion of the recent enactment of the 62nd General Assembly. At the outset we would point out that Sec. 13404a does not increase the maximum pay allowed a probate judge; it only fixes a minimum below which his compensation may not fall. The maximum compensation of a probate judge under section 13404, after deducting a reasonable amount for clerk hire is the same paid the Circuit Judge.

(See State ex rel Jasper Co. v. Gass 296 SW 431;
Smith v. Pettis Co. 136 SW (2d) 282.)

Thus we see, a probate judge's maximum varies from county to county, depending on the character of the judicial circuit and the volume of change of venue business in the circuit. In all circuits the annual compensation of the Circuit Judge will exceed \$2,400.00, the greatest minimum pay fixed for a probate judge under 13404a.

Under 13404a the probate judges who draw a minimum monthly salary "shall at the end of each and every month-- make and file with the County Clerk a report of all fees actually collected by him or his clerk during the month, (excepting marriage and inheritance tax fees)--- and that he shall at the end of the month pay over to the County Treasurer all monies collected by him or his clerk during the month which are required to be shown in the monthly report -----" (Emphasis ours).

If, however, the yearly fees earned and collected by the judge and his clerk exceed the minimum yearly salary under Sec. 13404a then he is entitled to a warrant on the County Treasurer for all such excess, where the excess sum, together with the minimum salary already withdrawn, does not exceed the amount paid to the Circuit Judge, together with an additional sum to "cover all reasonable and necessary expense for clerk hire." (See Sec. 13404.)

Under Sec. 2440 R. S. Mo., 1939, a probate judge is authorized to appoint a clerk "who shall be paid by said judge." The compensation of the clerk is paid out of the judge's minimum guarantee allowed under Sec. 13404a. Now, the judge, at the end of the year when he collects his fees and it is determined the amount he may retain under Sec. 13404 is permitted to retain a further sum, in addition to the maximum allowance, a sum to cover "all reasonable and necessary expenses for clerk hire."

All of the above brings us to the conclusion that the compensation the probate judge pays his clerk during the year can not be paid out of fees earned since the statute specifically provides that all fees must monthly be paid into the County Treasurer. The probate judge must pay his clerk out of his minimum salary.

Getting now to the question as to what specific fees the probate judge shall charge. Under Sec. 13404, each official act performed by the judge has been assigned a specific fee to be charged. We presume the Legislature intended a charge to be made for these acts else the particular fees would not have been set out with such exactitude under Sec. 13404a, the judge must not only make a charge for his services but he must account for same each month. He is charged with the responsibility and the statute leaves nothing to his discretion. Under the new statute he is required to perform his duty, charge the fee authorized, and account for same.

In passing we would observe that there are certain courtesies which the probate judge may extend without any thought of remuneration. No price tag has been put on these by the Legislature. Those acts for which the officer shall make a charge have been enumerated in the statutes and we conclude that the officer is under the duty imposed by his office to make a charge and account for same.

Looking now to the matter of the time for making and filing the reports required, we read that the probate judge "shall at the end of each and every month--- make and file a report." In this connection we see that section bearing on the question.

Section 655 R. S. Mo., 1939 provides certain rules for construction of statutes. It provides among other things "the word 'month' shall mean a calendar month." A calendar month is not at end until midnight of the last day of the month. Applying this to the requirement of new Section 13404a, we believe the filing of the report specified shall take place as soon thereafter the close of each month as is possible. The soonest possible date would be the 1st day of the succeeding month.

Without trying to become tedious, we have discussed questions not directly raised in your letter, however, the thought has come to us that in anticipating these questions, much time may be saved the Probate judges and their clerks.

Hon. Jos. V. Pitts

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Jan. 5, 1944

C O N C L U S I O N .

From the preceding discussion we therefore conclude, that with respect to Sec. 13404a R. S. Mo., 1939, a judge of the probate court should make a charge for any official act performed by him as such officer, which said act relates to his official duties involved in any case in his court. That the specific fee for each service performed is definitely set out and provided for by statute. That this officer must not only charge a fee for each of his official acts, but must account for all fees collected, except solemnization of marriages and inheritance tax hearing fees, and that this officer must make a report of these official fees to the county clerk. Furthermore, for fees earned but not collected, he shall also make a report. That a probate judge shall not account for fees collected for taking acknowledgments on deeds or administering oaths in situations where these documents are not involved in, or chargeable to any estate in his court.

Respectfully submitted

L. I. MORRIS

Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LIM:LeC

PROBATE : Do not have to account for acknowledgments
JUDGES' : and affidavits where probate seal is used,
FEES : if fees therefor not chargeable against
: estate pending in his court.



February 25, 1944

Honorable Joseph V. Pitts
Probate Judge
Douglas County,
Ava, Missouri

Dear Judge Pitts:

This office is in receipt of your letter of recent date in which you request an opinion, the full text of which reads as follows:

"Friend Morris: Your opinion on 'Probate Fees to be collected and reported to County Court, was very clear to me and I appreciated it.

"This A. M. I was called in to our County Court and the Presiding Judge, J. W. Vinson advised me that the 'Auditors', when here told him that I should account to & pay over to the County All fees charged, wherein the 'Probate Judge's SEAL was used.

"I do write deeds- Deeds of Trust--Chattel Mtges. Assign Car Titles, swear folk to affidavits and use the Probate 'SEAL', attesting. (In my letter I quoted to you the views of Ed Hill & Walter Black)

"I have in my library the SW 2nd. Series and have again reread your Citation, i. e. 136 SW (2nd) 282. (I find that I had marked this decision in my first study of this question, after the Auditor told me 'Technically I could be charged up with work done under the Probate Seal- And this was my reason for writing to you.

"To my mind Page #8 of your opinion 'Those acts for which the officer shall make a charge have been ENUMERATED in the Statute, and we conclude that the Officer is under the duty imposed by his Office to make a charge and account for same.'

"In your conclusion--Clerifying, you say:-
'That the Specific fee for each service performed
is definately set out and provided for by Statute'

"I want to avoid litigation with my County and
I kindly ask that you give me your Opinion on the
Use of the 'Probate Seal' on Ack. to deeds, T.D.
C. M. & Affidavits.

"Should I account for all fees taken in wherein
I use the Probate Seal?

"I will appreciate very much this consideration."

Before proceeding with the discussion, we again
call attention to our previous opinion of January 6, 1944,
in which we sought to dispose of this matter. In order
to further clarify it and to facilitate matters we include
a copy.

Sections 13404 and 13404a, R. S. Missouri, 1939,
concern themselves with fees for Judges of Probate. We
merely cite them for convenience. The extreme length
of the text prevents a detailed examination here.

Section 2447, R. S. Missouri, 1939 reads as follows:

"Every probate court shall have a seal of office,
of some suitable device, the expense of which,
and the necessary expense incurred by said court
for books, stationery, furniture, fuel and other
nesessaries, shall be paid by the County."

Section 2436, R. S. Missouri, 1939, establishes
our probate courts and says:

"A probate court, which shall be a court of record,
and consist of one judge, is hereby established
in the city of St. Louis, and in every county in
this state."

The fees connected with the office of probate judge
divide themselves into three classes. We propose to
discuss those provided for by statute and the others
which may come to this officer.

1. Certain fees are provided for and a charge authorized under the statutes. Section 13404, R. S. Missouri, 1939, enumerates the acts for which a charge must be made and the amount is definitely stated. Section 13404a, R. S. Missouri, 1939, should be read in connection with this discussion. In these portions of the statutes the Legislature has expressly provided for the rendition of service by the officer and an appropriate charge therefor. The official acts of this officer must be paid for according to the schedule as set out. Fees of this officer must be accounted for in strict compliance with the legislative intent. It is important to note that the Judge, the County Court, the estate, (or individual), are all involved in the collection, accounting and distribution of the funds coming into the hands of the probate judge. The duty imposed upon him by our laws is plain and exactly defined for the benefit of all. For all of the official acts mentioned there must be an appropriate charge and prompt accounting. Only two exceptions are made where the judge may collect a fee and retain it without accounting for same; these constitute the subject matter of our second paragraph.

2. (a) Fees for the solemnization of marriages, and
(b) Fees for the hearing of inheritance tax matters,

may be collected by the officer and he need not account for same. It is sufficient to say on this point, that our Legislature intended to make an exception. Having made it there need be no further discussion.

3. The third topic of discussion concerns itself with the fees received by the officer for services rendered for acknowledgment of deeds, assignments, writing of deeds of trust, making chattle mortgages and preparation of affidavits. This service concerns just two people, the judge and the party he has accommodated. These services have no connection with any estate or matter connected with his office. Our statutes do not specifically say he shall make a charge for such service, and make an accounting therefor and for that reason we conclude that, since not prohibited the acts may be performed for a fee and no accounting need be made to the county court. In this situation the act performed is purely a matter of accommodation on the part of the judge. He is not required to perform these acts and

Hon. Jos. V. Pitts

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Feb. 25, 1944

should he decline to perform no remedy is available to compel him so to do. Since no express declaration is made in the nature of a prohibition, we conclude that he may perform the act, charge a fee and need not account for same.

CONCLUSION.

From the reading of our statutes and from a previous opinion already submitted, it is therefore, the conclusion of this office that a probate judge shall account for those fees provided for in the statute. Fees received from acknowledgment of instruments, affidavits, etc., not involved in any estate under his jurisdiction, are not required to be accounted for under the statutes, and may be retained by the probate judge. The fact that the probate judge uses the seal of his office is not the determining factor in the question as to whether he must account for this class of fees received by him while in office.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney General

LIM:LeC

APPROVED:

ROY McKITTRICK
Attorney General

Encl.

CONSTITUTION: Section 14, Article X, Constitution of Missouri,
should not be withdrawn.

January 28, 1944

FILED

72

Honorable Howard C. Potter
Member, Constitutional Convention
State of Missouri
Jefferson City, Missouri

Dear Mr. Potter:

This will acknowledge receipt of your letter of
January 14, 1944, wherein you requested an opinion from
this department. Your opinion request reads as follows:

"As a member of the Constitutional Con-
vention, I introduced a proposal, No. 313,
which had as its purpose to repeal certain
sections of the Article on Taxation,
Article X of the Constitution of Missouri.
Among these sections sought to be repealed
was Section 14 of Article X.

"It was my thought that Section 14 could be
omitted entirely and nothing enacted in
lieu thereof. The basis for this thought
being that there were no outstanding bond
issues which were not provided for in the
amendment to the Constitution now author-
izing said bond issues which are now out-
standing and the further fact that if Sec-
tion 43 did not provide for the payment of
principal and interest of future bond
issues, the payment of principal and
interest of future bond issues could be
provided for in the Constitutional pro-
visions or statutory enactments approved
by the people authorizing these future
issues.

"After I presented the matter to the Com-
mittee on State Finance, they asked me to
get some further information along this

line. I would like to have the benefit of your opinion as to the fact of the omission from the Constitution of what is now Section 14 of Article X."

Section 14 of Article X of the Constitution of Missouri, provides as follows:

"The tax authorized by the sixth section of the ordinance adopted June sixth, one thousand eight hundred and sixty-five, is hereby abolished, and hereafter there shall be levied and collected an annual tax sufficient to pay the accruing interest upon the bonded debt of the State, and to reduce the principal thereof each year by a sum not less than two hundred and fifty thousand dollars; the proceeds of which tax shall be paid into the state treasury, and appropriated and paid out for the purposes expressed in the first and second subdivisions of section forty-three of Article IV of this Constitution. The funds and resources now in the State interest and State sinking funds shall be appropriated to the same purposes; and whenever said bonded debt is extinguished, or a sum sufficient therefor has been raised, the tax provided for in this section shall cease to be assessed."

Section 43 of Article IV of the Constitution of Missouri, provides as follows:

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law. All appropriations of money by the successive General Assemblies shall be made in the following order:

"First, For the payment of all interest upon the bonded debt of the State that may become due during the term for which each General Assembly is elected.

"Second, For the benefit of the sinking fund, which shall not be less annually than two hundred and fifty thousand dollars.

"Third, For free public school purposes.

"Fourth, For the payment of the cost of assessing and collecting the revenue.

"Fifth, For the payment of the civil list.

"Sixth, For the support of the eleemosynary institutions of the State.

"Seventh, For the pay of the General Assembly, and such other purposes not herein prohibited as it may deem necessary; but no General Assembly shall have power to make any appropriation of money for any purpose whatsoever, until the respective sums necessary for the purposes in this section specified have been set apart and appropriated, or to give priority in its action to a succeeding over a preceding item as above enumerated."

In your letter requesting an opinion you inferred that Section 43, cited above, provided for the payment of principal and interest of future bond issues and that its provisions would take the place of Section 14 which you desire to omit from the new Constitution. We cannot agree with this idea, since we do not feel that Section 43, supra, is self-enforcing. It will be noticed that the title of this section of the Constitution is as follows:

"Appropriations, order of, must be by law--revenue to go into treasury."

It is our opinion that Section 43, supra, is merely a provision providing that all money received by the State shall go into the treasury of the State and shall be appropriated in a certain manner and we do not feel that it can be taken as having the same effect as Section 14 of Article X, supra.

You further state in your request for an opinion that if Section 43, aforesaid, does not provide for the payment of the principal and interest of future bond issues, that such provision could be made in the constitutional provisions or statutory enactments approved by the people authorizing future issues. We agree with you that the people of this State can by an election authorize the payment of the principal and interest on bond issues in the manner in which you state and if in the submitting of the question to the electorate a provision was included as to the payment of the principal and interest of the bonds, then Section 14 of Article X, supra, would be an unnecessary provision. However, we must assume, if this provision is deleted from the Constitution, that in the submission of any future bond issues to the public that a provision relative to the payment of the principal and interest will be included. However, it is possible that in later years that there may be a submission of a bond issue to the public at which time there has been no provision of the kind in question attached.

Conclusion

Therefore, it is the opinion of this department that in view of the above that Section 14, Article X, should not, under the present law, be deleted from the Constitution of the State of Missouri.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG

SHERIFFS : Deputy sheriff may foreclose mortgages in the absence
MORTGAGES: of the regular sheriff.

February 4, 1944



Honorable Thomas V. Proctor
Prosecuting Attorney
Monroe County
Paris, Missouri

Dear Mr. Proctor:

We are in receipt of your request for an opinion under date of January 26, 1944, which request reads as follows:

"Monroe County has a number of School Fund Mortgages that the County Court desires to foreclose, Section 10385, R. S. Mo. 1939, provides that the sheriff of the county shall proceed to sell the property secured by said mortgages by order of the County Court.

"The duly elected, qualified Sheriff of Monroe County is now in the U. S. Navy and his office is being conducted by a deputy sheriff.

"Will you please give me an opinion as to whether the deputy sheriff can foreclose these mortgages in the absence of the regular sheriff and provided in the above mentioned section."

Section 10385, R. S. Mo. 1939, referred to in your letter, was repealed and a new section enacted, known as Section 10385, Laws of Missouri, 1943, page 882. The new section does not affect the question stated in your request, said section reading as follows:

"Every mortgage taken under the provisions of this chapter shall be in the

ordinary form of a conveyance in fee, shall recite the bond, and shall contain a condition that if default shall be made in payment of principal or interest or any part thereof, at the time when they shall severely become due and payable, according to the tenor and effect of the bond recited, and shall contain the further condition that if the borrower fail at any time during the existence of the loan to keep the buildings, if any, on the real estate insured against loss by fire and windstorm, with loss payable or mortgage clause attached to policy in favor of the county, that the sheriff of the county may, upon giving twenty days' notice of the time, place and property to be sold, by publication in some newspaper published in the county, if there be one published, and if not, by at least six written or printed handbills, put up in different public places in the county, without suit on the mortgage, proceed to sell the mortgaged premises or any part thereof, to satisfy the principal and interest, and make an absolute conveyance thereof, in fee, to the purchaser, which shall be as effectual to all intents and purposes as if such sale and conveyance were made by virtue of a judgment of a court of competent jurisdiction foreclosing the mortgage. In all cases of loan of school funds in the various counties, the expense of drawing and preparing securities therefor, and of acknowledging and recording mortgages, including the fees of all officers for the filing, certifying or recording such mortgages, and other securities, shall be paid by the borrower respectively."

Section 13134, R. S. Mo. 1939, provides:

"Every deputy sheriff shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff."

If the foreclosure of mortgages under Section 10385, Laws of Missouri, 1943, is one "of the duties prescribed by law to be performed by the sheriff," then under Section 13134, R. S. Mo. 1939, a deputy sheriff would possess the power and authority necessary to foreclose.

Section 10387, R. S. Mo. 1939, provides:

"Whenever the principal and interest, or any part thereof, secured by mortgage containing a power to sell, shall become due and payable, the county court may make an order to the sheriff, reciting the debt and interest to be received, and commanding him to levy the same, with costs, upon the property conveyed by said mortgage, which shall be described as in the mortgage; and a copy of such order, duly certified, being delivered to the sheriff, shall have the effect of a fieri facias on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly."

This section states that when the principal and interest become due and are not paid, the county court may make an order to the sheriff commanding him to levy upon the property conveyed by the mortgage. A copy of this order is delivered to the sheriff and has the effect of a fieri facias on a judgment of foreclosure by the circuit court.

Section 13138, R. S. Mo. 1939, reads as follows in so far as pertinent:

"Every sheriff * * shall * * execute all process directed to him by legal authority * * *."

It is his official duty to carry out the order of the county court.

In Tatum et al v. Holliday et al., 59 Mo., 1. c. 427, the present question was involved, the court stating:

"This brings us to another branch of the inquiry, viz: was the sale invalid because made by a deputy sheriff? If the sheriff acted in his official character as sheriff, then the sale was good, and could be legally performed by his deputy. But if he was simply a trustee, without regard to his capacity as sheriff, the sale would be void, because a trustee cannot delegate his trust.

"Where a trustee in any deed of trust to secure the payment of a debt or other liability, dies, resigns or becomes disabled, the statute provides that the court shall make an order appointing the sheriff of the county trustee to execute the deed of trust, in place of the original trustee, and thereupon such sheriff shall be possessed of all the rights, power and authority possessed by the original trustee under the deed of trust; and such sheriff shall proceed to sell and convey the property and pay off all the debts and liabilities, according to the terms and directions of the deed of trust, and with the same force and effect; and in case of a deed of trust given for the benefit and use of any person other than a deed of trust to secure payment of a debt or other liability, such court shall make an order appointing some suitable person as trustee in such deed of trust, in place of the original trustee, to hold the property or estate conveyed by such deed to the same uses and trusts, etc., (Wagn. Stat., 1347-Secs. 1, 2.)

"It will be perceived that provision is here made for the appointment of two classes of trustees. The first is where the sheriff is appointed to sell under a deed to pay a debt or other liability, and the second is where a suitable person, other than the sheriff, is appointed to hold property for uses and trusts.

"From the phraseology employed in the first, there might be some doubt as to the real character in which the sheriff acted, but we think the 4th section of the same law furnishes a solution and explains the legislative intent. It is there declared, that any person having a beneficial interest, present or future, absolute or contingent, in the trust property, may apply to the court for security to be given by the trustee. This applies to the appointment made under the second clause of the second section, and shows plainly enough that it was deemed unnecessary to require any security of the sheriff when he was acting as trustee, and the only reason that can be assigned is, that it was supposed that his security as sheriff was sufficient. The sheriff, when making a sale under a deed of trust, must therefore be considered as acting officially, and what he can perform by himself, he can perform by his deputy."

This case has been cited a number of times as authority for the proposition that the sheriff, acting under statutory appointment as trustee, does so officially.

Conclusion

It is the opinion of this department that a deputy sheriff may foreclose mortgages under Section 10385, Laws of Missouri, 1943, in the absence of the regular sheriff.

Respectfully submitted,

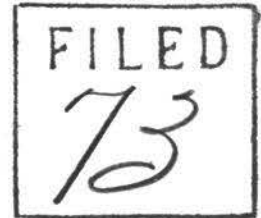
RALPH C. LASHLY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JUSTICES OF THE PEACE:) Wife of justice of the peace may not perform
OFFICERS:) his duties of office during his absence as
a member of the Armed Forces.

April 17, 1944



Honorable W. Oliver Rasch
Prosecuting Attorney
Jefferson County
Festus, Missouri

Dear Sir:

The Attorney-General acknowledges receipt of your letter of April 8, 1944, wherein you request the opinion of this Department. Your letter of request reads as follows:

"Benjamin Matthews is a Justice of the Peace in Joachim Township in this County. He has a large number of civil cases that have been filed before him. Some of these cases are pending, and judgments have been obtained in others.

"Mr. Matthews will be inducted into the armed forces on April 17, 1944. Naturally he will not resign, and therefore no one will be in charge of his office to handle the pending cases, or to issue executions or transcripts in the cases where judgments have been obtained.

"Mr. Matthews would like to have his wife handle his business while he is away. Is there any way in which she could be appointed or authorized to handle this business, without his resigning as Justice of the Peace?"

A diligent search fails to produce any statutory authority whereby a wife could be authorized to perform the duties of her husband, a justice of the peace, during his absence as a member of the Armed Forces. Indeed, our Supreme Court is aware of this situation and in the case of *State ex inf. McKittrick v. Wilson*, 166 S. W. (2d) 499, Judge Douglas states at page 502:

April 17, 1944

"We can readily anticipate that local inconvenience can result where an office-holder goes to war. It seems to us that some provision might be made, where there is none at present, for a substitute, an officer locum tenens, to fill the office while the regular officer is performing the greater duty of defending his country. Wounded soldiers are already returning to civilian life. Supposing there is an office-holder among them, would there be anyone who would not agree but that he should serve out his term of office if he were able? So it should be with every soldier who has the good luck to return. * * * *

"However, the matter of providing for substitute officers is for the attention of the Legislature which will convene within a month. * * *" (Emphasis ours.)

The Legislature has passed no law providing for substitute officers in accordance with the suggestion contained in the above quoted opinion.

Conclusion

It is the opinion of this Department that there is no statutory provision authorizing appointment of a substitute to act for a justice of the peace, where such officer is absent owing to induction into military service.

Respectfully submitted,

RALPH C. LASHLY
Assistant Attorney-General

APPROVED:

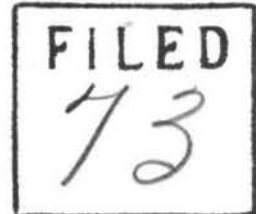
ROY MCKITTRICK
Attorney-General

RCL:EG

CITIES. : Cities of the third class not subject to
: taxation on airport owned in another
: county. May reasonably extend limits
: to include adjacent territory. Reason-
: ableness largely question of fact.
:
:

June 13, 1944

Honorable Curtis J. Quimby
Prosecuting Attorney
Cole County
Jefferson City, Missouri



Dear Mr. Quimby:

We are in receipt of your letter of June 8, 1944,
requesting an opinion of this office, which is as fol-
lows:

"It has been requested by the City, Chamber of
Commerce and others to obtain from you an opinion
on the following questions, 'Can the County of
Callaway levy a tax upon property in Callaway
County owned and operated in Callaway County by
the City of Jefferson, property being an Air Port'?
'Can the City of Jefferson extend its property
across the River into Callaway County so as to in-
clude the Air Port and probably other property
there'?"

"Of course, I regard part of this question as ridic-
ulous, but I am not asked for my opinion, I am
asked to obtain your opinion. Will you, therefore,
give me the benefit of your research on the above?"

With regard to the first question in your letter,
Sec. 6, of Art. X, of the Missouri Constitution provides:

"The property, real and personal, of the State
counties, and other municipal corporations,
and cemeteries, shall be exempt from taxation* * *."

Sec. 10937 R. S. Mo., 1939, provides:

"The following subjects are exempt from taxation:
First, all persons belonging to the army of the
United States; Second, lands and lots, public
buildings and structures with their furniture and
equipment, belonging to the United States; Third,
lands and other property belonging to this state;

fourth, lands and other property belonging to any city, county or other municipal corporation in this state, including market houses, town halls, and other public structures, with their furniture and equipment and all public squares and lots kept open for health, use or ornament. * * *

The land here was acquired by the city under specific legislative authorization. See Sec. 15122 R. S. Mo., 1939.

In *Grand River Drainage v. Reid*, 111 S. W. (2d) 151, where the court held a drainage district to be a municipal corporation within the meaning of the tax exemption provisions, the court at page 153 stated:

"So long as they proceed in conformity with the expressed or implied authority conferred, we perceive one reason why they may not successfully invoke the protection of Sec. 6, Art X, of our Constitution."

With regard to the second question in your letter, I refer you to Sec. 6866, R. S. Mo., 1939, which reads:

"The jurisdiction of any city which shall organize under the provisions of this article shall not in anywise be affected or changed in consequence thereof, but the limits, wards and boundaries of such city shall remain after such organization the same as they were previous; and all laws or parts of laws, or ordinances, not inconsistent with this article, which were in operation in such city prior to its organization under this article, or prior to the passage of this article, shall continue in force until repealed. The mayor and council of such city, with the consent of a majority of the legal voters of such city voting at an election thereof, shall have power to extend the limits of the city over territory adjacent thereto, and to diminish the limits of the city by excluding territory therefrom, and shall, in every case, have power, with the consent of the legal voters as aforesaid, to extend or diminish the city limits in such manner as in their judgment and discretion may redound to the benefit of the city." (R. S. 1929, Sec. 6720.)

June 13, 1944

Thus we see that cities of the third class are given the right to extend the limits of the city "over territory adjacent thereto." The fact that the proposed territory was in another county, would be a factor in determining whether the territory would be considered as "adjacent" and whether the proposed extension is reasonable.

In *Bituminous Casualty Corporation v. Walsh and Wells*, 170 S. W. (2d), 117, the court stated:

"'Adjacent' is lexically defined as lying near, close, or contiguous, neighboring, or bordering on, as a field adjacent to a highway, but it is not a definite and absolute term and its exact meaning is determinable principally by the context in which it is used, and the facts of each particular case.* * *"

It has also been held that the word "adjacent" is not inconsistent with the idea of something intervening. *Yard v. Ocean Beach Ass'n*, 49 N. J. Eq. 306, and that "adjacent" means next to or near; neighboring; while "adjoining" means "touching or contiguous." *Wolfe v. Hurry*, 46 F. (2d) 515.

The ordinance of course, must be reasonable. What is reasonable, is to a great extent a matter of fact and whether the court would consider the proposed extension here reasonable, we could not predict.

To a certain extent the courts have laid down rules on which to base their decisions as to whether extension of city limits is reasonable.

It has been held that since it is within the power of authorities of cities of the third class to provide by ordinance for extension of city limits, a particular ordinance enacted pursuant to this power will be presumed reasonable and valid. *State ex inf. v. City*, 193 S.W.989. *Bingle v. City*, 68 S. W. (2d), 866.

In the latter case the court went into the rule for interpreting reasonableness to some extent and at page 867, states it in these terms:

"* * * Appellants and respondents agree that under the settled doctrine of Missouri, in cases of this character, the rule is that the city limits may reasonably and properly be extended so as to take in contiguous lands: (1) When they are platted and held for sale or use as town lots; (2) whether platted or not, if they are held to be put on the market and sold as town property when they reach a value corresponding to the views of the owner; (3) when they furnish the abode for a densely settled community, or represent the actual growth of the town beyond its legal boundary; (4) when they are needed for any proper town purpose, as for the extension of its streets, or sewer, gas, or water system, or to supply places for the abode of business of its residents, or for the extension of needed police regulation; and (5) when they are valuable by reason of their adaptability for prospective town uses, but the mere fact that their value is enhanced by reason of their nearness to the corporation would not give ground for the annexation, if it did not appear that such value was enhanced on account of their adaptability to town use. This rule provides further the following two negative tests, that is, that city limits shall not be extended to take in adjacent, contiguous lands; (1) When they are used only for purposes of agriculture or horticulture and are valuable on account of such use; (2) when they are vacant and do not derive special value from their adaptability for city uses. State ex inf. Major v. Kansas City, 233 Mo. 162, Loc. cit. 213, 214, 134 S. W. 1007, which has been followed in Stoltman v. City of Clayton, 205 Mo. App. 568, 226 S. W. 315; Prairie Pipe Line Co. v. City of Moscow Mills (Mo. App.) 300 S. W. 298; Winter v. City of Kirkwood (Mo. App.) 296 S. W. 232; Jones v. City of Clayton (Mo. App.) 7 S. W. (2d) 1022.

"It is apparent that under the rule above stated the facts of each case are the primary consideration, and if the facts and circumstances of the case show that the land sought to be annexed can be held to fall within any one of the five positive tests of the said rule,

Honorable Curtis J. Quimby

-5-

June 13, 1944

then the annexing ordinances may be upheld, provided that the facts found to exist do not bring the case within the prohibition of either of the two negative tests.* * *

CONCLUSION.

It is, therefore, the opinion of this office that a city is not subject to taxation on an airport owned by it in another county. It is further the opinion of this office that a city of the third class may extend its limits to include territory adjacent thereto, provided such extension is reasonable. What is reasonable, is to a large extent a question of fact.

Respectfully submitted

ROBERT J. FLANAGAN
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

RJF:LeC

SCHOOLS.

School District sending pupils to another district may not claim credit on tuition for taxes paid by residents of its districts to receiving district.

September 8, 1944

Mr. John A. Rauh, Superintendent
Brookfield Public Schools
Brookfield, Missouri

9/26
FILE

73

Dear Mr. Rauh:

This will acknowledge your letter of August 29, requesting an opinion, which is as follows:

"Section 10340 of the Missouri School Laws, 1942 makes a statement on 'credit on tuition taxes paid.' This section indicates 'any person' could this section be interpreted as a 'school district' instead of 'any person.'

"We have a rural school district that is closed and transports its pupils. They have been paying tuition on a pupil for several years. The parent of this pupil lives in the rural district but owns land in the Brookfield School District. Now the rural district claims that the amount of taxes paid in Brookfield District should be deducted from their tuition payment. The rural district pays the tuition and not the parent. This pupil is an elementary pupil.

"We should like very much to have your opinion on the above question."

Section 10324 R. S. Missouri, 1939, provides:

"Whenever any school district in this state, now organized or that may be hereafter organized under the laws of this state, shall fail or refuse, for the period of one year, to provide for an eight months' school in such year, provided a levy of forty cents on the one hundred dollars' valuation, together with the public funds and cash on hand, will enable them to have so long a term, the same shall be deemed to have lapsed as a corporate body, and the territory theretofore embraced within such lapsed district shall be deemed and taken as unorganized territory, and the same, or any portion thereof, may be attached to any adjoining district or districts for school purposes, in the same manner as is now provided in section 10408; Provided, that

no school district shall be deemed to have lapsed where the failure to make the needed provision for the eight months of school results from the irregular or void proceedings had for that purpose; Provided, that in any district enumerating fewer than twenty-five children the board may, from year to year, arrange with the board or boards of other district or districts for the admission of all children of school age in said district containing fewer than twenty-five children enumerated and, if desired, arrange for transporting children to and from school. And, when ratified by a two-thirds vote of the qualified voters of said school district, voting at a special meeting, such arrangements shall be final, and the board will be authorized to issue warrants upon the teachers' funds for payment of tuition, and upon the incidental fund for the payment of cost of transporting pupils. (R. S. 1929, Sec. 9195)."

I assume that the district you speak of is closed for the reason set out in the above statute and that it is therefore sending its pupils to the Brookfield district in accordance with the proviso in the statute. It must be noted that the statute clearly provides for the payment of tuition by the district out of the teacher's fund. The district and not individuals are sending these non-resident pupils to the Brookfield district.

Sec. 10340 R. S. Mo. 1939, provides:

The board shall have power to make all needful rules and regulations for the organization, grading and government in their school district-- said rules to take effect when a copy of the same, duly signed by order of the board, is deposited with the district clerk, whose duty it shall be to transmit forthwith a copy of the same to the teachers employed in the schools; said rules may be amended or repealed in like manner. They shall also have the power to suspend or expel a pupil for conduct tending to the demoralization of the school, after notice and a hearing upon charges preferred, and may admit pupils not residents within the district and prescribe the tuition fee to be paid by the same,

except as provided for in Section 10458, R. S. 1939: Provided, that the following children, if they be unable to pay tuition shall have the privilege of attending school in any district in this state in ~~which~~ they may have a permanent or temporary home; First, orphan children; second, children bound as apprentices; third, children with only one parent living, and fourth, children whose parents do not contribute to their support; Provided, further, that any person paying a school tax in any other district than that in which he resides shall be entitled to send his or her children to school in the district in which such tax is paid and receive credit on the amount charged for tuition to the extent of such school tax. (R. S. 1929, Sec. 9207. Amended, Laws 1939, p. 694.)"

This section clearly applies to individuals who for some personal reason send their children to school in another district even though the school district in which they reside may maintain a school.

The cases have held that where an individual decides to send his children to school in a district other than that wherein he resides he must pay tuition for them. See School District of Barnard v. Matherly, 90 Mo. App. 403; Barnard School District v. Matherly, 84 Mo. App. 14; Binde v. Klinge, 30 Mo. App. 285.

However, when these individuals are paying taxes also in the district in which they were not resident the statute gives them the right "to send his or her children to school in the district in which such tax is paid and receive credit on the amount charged for tuition to the extent of such school tax. The statute, by the use of the words "his or her" would clearly seem to exclude School Districts from claiming this benefit. In any event, the School District doesn't pay the tax to the other district. It is difficult to see how the School District could claim benefits to itself for taxes one of its residents pays in the Brookfield District any more than the Brookfield District could claim any right to the taxes paid by the resident in his home district. Any rights acquired by the paying of these taxes are purely those of the person who pays them.

Mr. John A. Rauh

-4-

Sept. 9, 1944

Suppose for the sake of argument the School District were allowed to claim benefits of tax payments as one of its residents in another district, then suppose that that resident had another child resident in another district which he personally desired to send to the Brookfield District and for which he personally would be liable for tuition. Could it conceivably be held that the School District and not he would be entitled to claim credit for the tax he was paying to the Brookfield District. We think not.

CONCLUSION.

It is therefore, the opinion of this office that a School District sending its pupils to another District may not claim credits on tuition for taxes paid by residents of its district to the receiving district.

APPROVED:

Respectfully submitted

VANE C. THURLO
Acting Attorney General

ROBERT J. FLANAGAN
Assistant Attorney General

RJF:LeC

COUNTY SURVEYORS: Who are ex officio highway engineers must pay registration fee as provided by C. S. S. B 61, Laws of Mo. 1941.

January 11, 1944



Honorable Marion Robertson
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Mr. Robertson:

The Attorney-General wishes to acknowledge receipt of your letter of December 27, 1943, in which you request an opinion of this Department. This opinion request, omitting caption and signature, is as follows:

"I Have been requested by John W. Van-Arsdale, County Surveyor, to write you the following letter:

"Under Section 8660, R. S. of Missouri, 1939, in counties of over 20,000 inhabitants, the County Surveyor is ex-officio County Highway Engineer.

"Under C.S.S.B. 61, Laws of Missouri, 1941, Section 26, it is unlawful for any person to practice engineering, which involves preparation of plans and supervision of construction, for public hire, who is not a Registered Professional Engineer.

"Considering both of these laws, can a person, who is not a Registered Professional Engineer, qualify for, and hold, the office of County Surveyor and Ex-officio Highway Engineer?

"Your consideration of this question and a reply at your earliest convenience will be greatly appreciated."

January 11, 1944

It appears that your question does not involve the necessity of the registration of a county surveyor alone, but only involves the registration of a county surveyor in counties of over 20,000 inhabitants wherein the county surveyor is by statute pronounced ex-officio county highway engineer.

As far as the surveyor is concerned, it appears that an exception in Committee Substitute for Senate Bill No. 61 provides that he shall not come under the provisions of this particular statute. To substantiate my view in this matter I will call you attention to sub-section "d" of Section 17 of such bill, which is found on page 664 of the Laws of Missouri for 1941, which provides as follows:

"(d) Land surveyors whose work includes surveying of areas for their correct determination and description and for conveyancing, or for the establishment or re-establishment of land boundaries and the plotting of lands and subdivisions thereof, but does not include any designing or supervision of construction."

In other words, it would appear that a county surveyor, whose work is merely the surveying of areas and the establishment of boundaries, is exempted from the provisions of C. S. S. B. 61. However, as stated above, your question seems to involve the proposition of whether an ex-officio county highway engineer shall pay such registration fee.

Section 8660, R. S. Mo. 1939, provides that in counties of not less than 20,000 inhabitants nor more than 30,000 inhabitants the county surveyor shall be ex-officio county highway engineer. As ex-officio county highway engineer, this officer has various duties to perform among which is the supervision of the highways of the county in which he is an officer.

We wish to call your attention to Section 8662, R. S. Mo. 1939, which provides as follows:

"The county highway engineer shall have direct supervision over all public roads of the county, and over the road overseers and of the expenditure of all county and district funds made by the road overseers of the county. He shall also have

the supervision over the construction and maintenance of all roads, culverts and bridges. No county court shall order a road established or changed until said proposed road or proposed change has been examined and approved by the county highway engineer. No county court shall issue warrants in payment for road work or for any other expenditure by road overseers, or in payment for work done under contract, until the claim therefor shall have been examined and approved by the county highway engineer."

It would appear from the provisions affecting the county highway engineer that his duties as provided by statute include the designing and supervision and construction of bridges and culverts. If his duties include this, he will not be exempt under sub-section "d" of Section 17, C.S. S. B. 61. When he designs and supervises the construction of bridges, culverts etc., he is no longer surveying areas for the correct determination and description and the establishment of land boundaries but is engaging in matters which affect the public safety. We further cannot see that the mere fact a man is a surveyor and has been elected to his position by the people of the county wherein he lives, will cause him to be exempt from the payment of the registration fee as provided under C. S. S. B. 61, Laws of Missouri for 1941.

In counties containing less than 20,000 inhabitants or in any counties wherein the surveyor is not by statute ex-officio county highway engineer, it is possible that his duties will only involve the establishment of boundaries and the surveying of property for the purpose of conveyance, in which case we do not feel that it would be necessary for him to pay a registration fee as provided by the statute in question. However, where by statute he is given the power to supervise and design the construction of certain bridges and culverts, it then becomes incumbent upon him to pay a registration fee as provided by C.S.S.B. 61.

Conclusion

Therefore, it is the opinion of this Department that in counties having not less than 20,000 inhabitants nor more than

January 11, 1944

30,000 inhabitants, where by statute the county surveyor is ex-officio county highway engineer, it is necessary that he pay a registration fee and become a registered professional engineer in order to perform the duties of his office.

It should be understood from the conclusion reached in this opinion that a provision passed in 1943 is not retro-active and, of course, cannot apply to surveyors which come under this class who were elected prior to the passage of this law in 1943.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG

COUNTY DEPUTY CIRCUIT CLERK: Circuit Judge, or Judges, may
SALARY: increase the compensation of
deputy circuit clerk.

January 13, 1944



Honorable Allen Rolston
Prosecuting Attorney
Schuyler County
Lancaster, Missouri

Dear Sir:

This will acknowledge receipt of your letter of
December 9, 1943, requesting an opinion from this Depart-
ment, which reads as follows:

"Mrs. Maudie Kirby is Deputy Clerk of
the Circuit Court of Schuyler county.
Her salary was fixed at \$75.00 per
month at the time of her appointment,
and by order of Judge Higbee. All
apparently in strict compliance with
the provisions of Sec. 13434, R. S.
1939.

"Since then the duties of this clerk
have greatly increased, and she is ask-
ing a raise in salary. The question
is whether or not the judge of circuit
court, presumably while court is in
session, can make a valid order increas-
ing her salary to properly reimburse her
for the extra work she now has to do. I
will very much appreciate an opinion from
you on this question."

It is a well recognized law in this state that a public
officer has no vested interest in his office or in the com-
pensation provided therefor.

As was stated in Sanderson v. Pike County, 195 Mo. 598,
1. c. 605:

"* * * It is well-settled law in this State that the right to compensation for the discharge of official duties is purely a creature of the statute, and that the statute which is claimed to confer that right must be strictly construed. The right of a public officer to compensation is derived from the statute, and he is entitled to none for services he may perform as such officer, unless the statute gives it. * * * * *

"Such compensation is not the creature of contract nor dependent upon the fact, or value of services actually rendered * * * and cannot be recovered upon quantum meruit. * * *"

Under Section 11812, page 371 Laws of Missouri 1933, the county court was authorized to fix the salary of such deputy clerk and the Act specifically provided that the county court may at any time modify or rescind its order permitting any appointment to be made, and specifically provided that the county court may reduce the compensation theretofore fixed by it. Under such a provision it is quite apparent that the compensation of such deputy, or deputies, could be reduced but not increased, since the Act specifically provided for a reduction and was silent as to any increased compensation. Subsequent thereto the Fifty-ninth General Assembly repealed the above provision and enacted in lieu thereof Section 11812, page 446, Laws of Missouri 1937, now known as Section 13434, R. S. Mo. 1939, authorizing the circuit clerk to appoint a deputy, or deputies, with the approval of the judge or judges of the circuit court, as the judge or judges shall deem necessary, and further provides that the circuit judge, or judges shall fix the compensation of such deputy, or deputies; which order shall specify the period of employment. Said section further grants to the circuit court or courts, the power to modify or rescind its order permitting an appointment to be made. Said section reads as follows:

"Every clerk of a circuit court shall be entitled to such number of deputies

and assistants to be appointed by such official, with the approval of the judge or judges of the circuit courts, as such judge or judges shall deem necessary for the prompt and proper discharge of the duties of his office. The judge or judges of the circuit court, in its order permitting the clerk to appoint deputies or assistants, shall fix the compensation of such deputies or assistants which said order shall designate the period of time such deputies or assistants may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the county clerk. The clerk of the circuit court may at any time, discharge any deputy or assistant, and may regulate the time of his or her employment, and the circuit court may, at any time, modify or rescind its order permitting an appointment to be made."

In reading the above provision we find that it no longer specifically provides for a reduction in compensation of the deputy or deputies.

Corpus Juris lays down a general rule of law under certain conditions, and, in Vol. 46, Sec. 253, page 1020, says:

"* * * An officer's compensation, established by statute, cannot be increased or diminished by an executive officer or board, although such executive or board is the appointing power, and a statute delegating to a board the power to fix salaries within certain limits contemplates that the salary shall be so fixed at the commencement of the term and shall not be thereafter changed."

However, the foregoing rule refers to compensation established by statute and also such salary that is fixed within certain

limits and that shall be fixed at the commencement of the term. The question now is, is there a specific term of office.

Section 8, Article XIV of the Constitution of Missouri, prohibits the compensation of any county officer from being increased during his term of office, and reads as follows:

"The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

In construing the above provision the Supreme Court of Missouri, in *State ex rel. v. Gordon*, 238 Mo. 168, 1. c. 180, held that an Adjutant General who, under the law, shall be appointed by the Governor, and shall hold office during the term of the Governor, and may be removed at his pleasure, does not have any term of office in the sense that the phrase is used in the Constitution. In so holding the court said:

"Recognizing the precision of definition judicially indulged in the exposition of the constitutional provision now up, as already indicated, we now come to a closer view of the case and to the application of the doctrines announced to the facts in judgment. The final question is: Considering the terms of the law of 1905 under which relator was appointed, does he have a 'term of office' in a constitutional sense? Clearly no. The statute provides that the Adjutant-General shall be appointed by the Governor, that he shall be military secretary to the Governor and that he 'shall hold office during the term of the Governor and may be removed by him at his pleasure.' If the statute had said he should hold office 'during the term of the Governor' and had broken off at that point we would have a different case to deal with. In such case

his term would have the same boundaries as the Governor's term. By referring to this certainty, the term of the Adjutant-General would be made certain and the maxim, id certum est, would control the situation. But the law does not break off there and neither should we in the exposition of it. It goes on to say in the same breath that the Governor may remove him at 'his pleasure.' The Governor's breath, under the law, made him, and the Governor's breath is left to unmake him. The appointing power has left to it the disappointing power unchecked, free of limit in time, place or circumstance. No man who holds office at the pleasure of another can be said to have a certain fixed term of office. The two ideas are radically antagonistic and in right reason they cannot both apply at the same time to the same thing. The Governor's 'pleasure' has no fixed bounds discernible to the judicial eye.

"It seems to us that the cited authorities directly apply to the situation thus presented; for the sum of the matter is that any one that holds office at the pleasure of the appointing power has no 'term of office' in the sense that phrase is used in the Constitution. This view of it does not make the words 'hold office during the term of the Governor' perish by construction. Those words are still left as a legislative direction that in any and all events the military secretary of the Governor shall step down and out with the Governor himself. The Governor is the commander in chief of the National Guard by virtue of his office, and when he lays down his official sword his military secretary must lay down his official pen. The construction given but makes the whole law alive by giving some sensible office to all its words.

"Hitherto, we take it, such has been the administrative policy in dealing with a legislative increase of salary where the officer interested holds his office during the pleasure of the appointing power.

"Let us put one case as an example. The statute authorizes us to appoint a librarian. The condition is such that he holds under our pleasure. Twice during the present librarian's official life his salary has been increased by the General Assembly, once from nine to twelve hundred dollars (Laws 1905, p. 304), and again from twelve to fifteen hundred dollars (Laws 1907, p. 355). In each instance he has been allowed to take, as was right, his increased salary.

"Our learned Attorney-General makes an ingenious argument against such construction. As we grasp it his contention is that relator's term of office has a fixed and definite tenure, to-wit, that of the Governor, and that the removal part of the statute brings into view a new and independent matter, viz., the power of removal which may be exercised at pleasure. But we do not think a fair construction of the law allows it to be taken apart and then joined together so as to make of it two independent provisions. The clause in hand is inseparable, relates to the same subject-matter and what the Legislature hath joined together we ought not put asunder. Our conclusion is an absolute writ of mandamus should go on the return of respondent."

It has even been held that when a power of appointment is conferred and no term is fixed by law, then the appointee may be removed at pleasure by the appointing authority, even without notice. See *State v. Hedrick*, 241 S. W. 402, 1. c. 416.

CONCLUSION

It is, therefore, the opinion of this Department that since the Deputy Circuit Clerk does not have any term of

office, as contemplated in Section 8, Article XIV of the Constitution, supra, and since the Circuit Court may modify or rescind the appointment at will, the Circuit Court is not inhibited from increasing the compensation of the Deputy Circuit Clerk.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

ARH:CP

TAXATION: Associations organized under Article 23, Chapter 102, R. S. Mo. 1939, are not exempt from merchant's tax.

November 16, 1944

FILE

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11/17

Honorable Marion Robertson
Prosecuting Attorney
Marshall, Missouri

Dear Mr. Robertson:

We have your letter of recent date which reads as follows:

"The Saline County Milk Producers' Association is organized as a non-profit, co-operative association of this county, as provided by Section 14334 to 14363 inclusive. The Board of Equalization of this County has from year to year, assessed a merchant's tax against them for \$3000; this year, however, they increased that assessment to \$10,000, and the Saline County Milk Producers' Association has questioned whether they are subject to any merchant's tax because they are organized under Article 23, and seem to rely to a great extent upon Section 14362, R. S., 1939, which provides for a payment of \$10.00 annually in lieu of all franchise or license or corporation or other taxes, or taxes or charges upon reserves held by the members of such association.

Our Board of Equalization would like to know if they have authority to assess a merchant's tax upon this association."

Your letter does not definitely so state, but we assume that the concern you mention has a stock of merchandise

at some store, stand or place where it is offered for sale. We say this because the association seems to claim exemption from merchant's tax and relies upon Section 14362, R. S. Mo. 1939. We will assume, therefore, that the Saline County Milk Producers' Association is a merchant and that the only question involved in your letter is whether the law governing that kind of an association exempts it from paying merchant's tax.

A merchant's tax is a property tax and not a license tax. In *State ex rel. v. Alt*, 224 Mo., 1. c. 506, it is said:

"The taxation of merchants and manufacturers in this state, though nominally and in form a license tax, is, in fact, as often held by this court, a property tax, and not merely an occupation or license tax, and the merchants' statements furnish a basis alike for state, school and municipal taxation. (*State ex rel. v. Kinney*, 48 Mo. 374; *State ex rel. v. Tracy*, 94 Mo. 217; *Cape Girardeau v. Riley*, 72 Mo. 220; *Aurora v. McGannon*, 138 Mo. 38; *State ex rel. v. Ashbrook*, 154 Mo. 375.)"

Such a tax is a tax on the stock in trade of the merchant (*State ex rel. v. Tracy*, 94 Mo. 217, 225).

Since a merchant's tax is a property tax, our question then is whether the Legislature by Section 14362, *supra*, has undertaken to exempt the property of this particular class of merchants from general property taxes which are assessed against the property of other merchants. In considering this question we must start with the premise that taxation is the rule and exemption therefrom is the exception. The rule was stated in the recent case of *State ex rel. Mitchell*, 181 S. W. (2d) 496, 499, as follows:

"* * * The general doctrine is that tax exemption statutes should be strictly construed because taxes are imposed on the whole citizenry for the support of the government, and exemptions are discriminatory. 61 C. J. Sec. 396, p. 392.

"'Taxation is the rule, exemption is the exception.' Young Women's Christian Ass'n v. Baumann, 344 Mo. 898, 902 (1), 130 S. W. 2d 499, 501 (1). * * * * *

Therefore, in construing Section 14362, supra, we must apply this rule of strict construction, under which rule an exemption is not allowed unless clearly and unmistakably it is granted by the language of the statute.

Said Section 14362 reads as follows:

"Each association organized hereunder shall pay an annual fee of ten (\$10) dollars only, in lieu of all franchise or license or corporation or other taxes, or taxes or charges upon reserves held by it for members."

Said section does not use the words "property tax" and does not in express language undertake to exempt such associations from paying property taxes. If it undertakes to make such exemption, it is by the use of the words "other taxes." Under the rule of strict construction above mentioned no intendment is made in favor of such exemption, but the exemption must be specifically and clearly provided. Therefore, any doubt as to whether the Legislature intended to include property taxes in the words "other taxes," must be resolved against such inclusion.

Furthermore, in construing a statute containing reference to specific things followed by general words, the general words will be construed to refer to things of the same kind or class as those specifically mentioned. This rule of construction has uniformly been followed by the courts of this state. In State ex rel. v. Wilson, 166 S. W. (2d) 499, 501, the court said:

"Section 13284 is not applicable unless the term 'or otherwise' can be held to apply. This term follows the enumeration of specific instances which create a vacancy and must be construed under the rule of ejusdem generis. 'It is a familiar rule of statutory construction that where

an enumeration of specific things is followed by some more general word or phrase, such general word or phrase should be construed to refer to things of the same kind. 19 C. J. p. 1255.
State ex rel. Goodloe v. Wurdeman, 286 Mo. 153, 227 S. W. 64, 67. * * * * *

In McClaren v. Robins & Co., 162 S. W. (2d) 856, the court was considering a statute which read as follows:

"Every druggist or other person who shall sell and deliver any arsenic, strychnine, corrosive sublimate, prussic acid or other substance * * usually denominated as poisonous, without having the word 'poison' * * * shall be fined not exceeding \$25."

In disposing of that case the court said (l. c. 858):

"Carbon tetrachloride is not found in the above section, but appellant contends that it comes within the phrase 'other substance * * * usually denominated as poisonous.' The ejusdem generis rule is that where a statute contains general words only, such general words are to receive a general construction, but, where it enumerates particular classes or things, followed by general words, the general words so used will be applicable only to things of the same general character as those which are specified. * * *"

Under the foregoing and established rule we must limit the words "other taxes" to taxes of the same character and class as "franchise, license, or corporation taxes." Clearly, property taxes do not fall within that class of taxes, since taxes of that class are taxes on occupations or privileges, while merchants' taxes are ad valorem taxes on property. For that reason we do not think that Section 14362, supra, exempts such associations, as are mentioned in your letter, from paying merchant's tax on its stock in trade.

Nov. 16, 1944

Conclusion

It is, therefore, the opinion of this office that associations organized under the provisions of Article 23, Chapter 102, R. S. Mo. 1939, are not exempt from paying merchant's tax upon a stock of merchandise owned and held for purposes of sale.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

HHK:EG

MISSOURI REAL ESTATE ACT: A pardon does not permit the
CONVICTION: Missouri Real Estate Commission
PARDON: to issue a broker's or salesman's
license to one who has been con-
victed of offenses designated in
Section 14 of the Missouri Real
Estate Act.

March 15, 1944

Mr. E. D. Ruth, Jr., Chairman
Missouri Real Estate Commission
Jefferson City, Missouri

3-29



Dear Sir:

We have for attention your letter of recent date in which you request the opinion of this department. Your letter is as follows:

"Section 14 of the Act creating the Missouri Real Estate Brokers and Salesmen's License Law, provides that 'no license shall be issued by the Commission to any person known by it to have been convicted of forgery, embezzlement, etc.'"

"This question has been presented to the Commission.

"An application has been filed for a real estate license as a broker, by a party who states that he was formerly in the real estate business in the State of Missouri; that in 1933 the Company under which he was doing business, came into financial difficulty and he decided, so that there would be less loss to clients and creditors, to place his Company in the hands of a receiver. Several of the clients who had deposited amounts of money with his Company, then brought charges against him because they could not get their deposits back, as his Company was now in the hands of a Receiver.

"In January, 1934, charges were brought against him in the Circuit Attorney's Office in St. Louis, for embezzlement of those funds.

"He claims that being ill-advised, he was persuaded to plead guilty to charges of embezzlement by a bailee, although he claims he had never been arrested nor indicted, was sentenced to a 10 year term and was sent to Jefferson City; that in February, 1938, he was paroled by the Governor and a year later pardoned by the Governor.

"Is the Commission in a position to issue a license to this man providing they feel that a license should be granted to him?"

The facts are set forth in your letter. Boiled down, the question is: Is the Missouri Real Estate Commission, by reason of Section 14 of the Missouri Real Estate Act, found at page 430, Laws of Missouri 1941, barred from issuing a broker's or salesman's license to one who has been convicted of a crime designated in said section, and who has received from the Governor of Missouri a full pardon for said crime.

We have before us the pardon, which, we understand, forms the basis for your request, and we set forth the conditions of the pardon, as follows:

"I, Forrest C. Donnell, Governor of the State of Missouri, do hereby pardon, release, discharge and forever set free * * * * *, who was at the December Term, A. D. Nineteen Hundred and Thirty-three, by a judgment of the Circuit Court of St. Louis City sentenced to imprisonment in the penitentiary of this State for the term of ten years, for the crime of Embezzlement by Bailee and I do hereby restore to him all the rights of

citizenship and entitle the said
* * * * * to all the
rights, privileges and immunities
which by law attach to and result
from the operation of these presents:"

That part of Section 14 of the Missouri Real Estate Act involved in your question is found at page 430, Laws of Missouri, 1941, and provides as follows:

"Where during the term of any license issued by the commission the licensee shall be convicted in a court of competent jurisdiction in the state of Missouri or any state (including federal courts) of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses and a duly certified or exemplified copy of the record in such proceedings shall be filed with the commission, the commission shall revoke forthwith the license by it theretofore issued to the licensee so convicted. No license shall be issued by the commission to any person known by it to have been convicted of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses, or association or copartnership of which such person is a member, or to any association or copartnership of which such person is an officer, or in which as a stockholder such person had or exercises a controlling interest either directly or indirectly."

It will be conceded that the crime of embezzlement by bailee, for which the subject was convicted and for which he was pardoned, comes within the provisions of that

portion of the statute quoted above, and is a crime for which a license shall not be issued by the Commission, unless a pardon removes the conditions of this statute.

The Governor of the state, under Article V, Section 8 of the Missouri Constitution, has the power to grant reprieves, commutations and pardons, after conviction for all offenses, except treason and cases of impeachment, upon such condition and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons.

Section 4561, R. S. Mo. 1939, provides as follows:

"Any person who shall be convicted of arson, burglary, robbery or larceny, in any degree, in this article specified, or who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions of this article, shall be incompetent to serve as a juror in any cause, and shall be forever disqualified from voting at any election or holding any office of honor, trust or profit, within this state: Provided, that the provisions of this section shall not apply to any person who at the time of his conviction shall be under the age of twenty years: Provided further, that in all cases where persons have been convicted under this article the disqualification provided may be removed by the pardon of the governor any time after one year from the date of conviction."

(Underscoring ours.)

Section 9227, R. S. Mo. 1939, provides as follows:

"When any person shall be sentenced upon a conviction for any offense, and is

thereby, according to the provisions of this article, disqualified to be sworn as a witness or juror in any cause, or to vote at any election, or to hold any office of honor, profit or trust within this state, such disabilities may be removed by a pardon by the governor, and not otherwise, except in the case in the next section mentioned.

(Underscoring ours.)

It will be observed that the Legislature has intended by these two sections to remove the disqualifications attending the conviction of a person of the crimes designated in the respective articles of which these sections are a part and parcel. However, it will be noted that, under that part of Section 14 of the Missouri Real Estate Act, here under consideration, namely: "No license shall be issued by the Commission to any person known by it to have been convicted of forgery, embezzlement, etc.," there is no proviso which states that the disqualification attaching thereto by reason of a conviction for any of the above offenses, is removed by a pardon. Neither is there any provision elsewhere in the Missouri Real Estate Act which states that a pardon removes such disqualification.

In the case of Hughes v. State Board of Health, 159 S. W. (2d) 277, where the State Board of Health was proceeding against a physician to revoke his license to practice medicine by reason of being a person of bad moral character and guilty of unprofessional and dishonorable conduct, wherein he had been convicted in the Federal Court of using the mails in the furtherance of a scheme to defraud, and the doctor defended on the theory that he had a Presidential pardon, the court said, 1. c. 279:

"The fact that respondent received a presidential pardon, full and unconditional, in no way affects the situation before us. It cannot be construed as restoring good character. Generally speaking, a pardon 'is an act of grace * * * which exempts the individual on

whom it is bestowed from the punishment the law inflicts for a crime he has committed.' *Lime v. Blagg*, 345 Mo. 1, 131 S. W. 2d 583, 585, quoting from 46 C. J. 'Pardons' Sec. 1. Whether an unconditional pardon had the effect of restoring to one convicted of a crime a license to practice the art of healing revoked because of such conviction was considered in *State v. Hazzard*, 139 Wash. 487, 247 P. 957, 959, 47 A.L.R. 538. In a well-reasoned opinion the court concludes that a pardon merely restores civil rights and not the right to resume the practice of the art of healing. 'Our investigation has disclosed no decision by a court of last resort, other than *Ex parte Garland*, supra (4 Wall. 333, 18 L. Ed. 366 (previously distinguished)), holding that it further restores the extraordinary right to practice any of those professions which, because of their peculiar relation to the public, require that those holding licenses must have the important qualification of good character.' The annotation in 47 A.L.R. 542 points out that this decision is in accord with the rule applicable to office-holders (including lawyers in that category) which holds the forfeited office is not restored by reason of the pardon. *Page v. Watson*, supra, dealt with the same question and reached the same conclusion."

Also, we quote from 39 Am. Jur. 555, Sec. 59, as follows:

"* * * It is likewise well settled that a pardon does not restore one to a license or other special privilege forfeited by reason of his conviction of a crime of which he is pardoned. If, for example, an attorney is disbarred following his conviction

of crime, a pardon of that crime does not of itself restore his right to practice law, and the same rule applies to a physician whose license has been revoked following conviction of a crime of which he is subsequently pardoned. A pardon issued under constitutional power to limit fines and forfeitures, to a physician convicted of manslaughter, whose license to practice medicine was revoked because of such conviction, does not restore the right to practice, although it purports to restore all the rights and privileges forfeited by the conviction."

Also, we quote from 46 C. J. page 1193, Sec. 32, as follows:

"* * * While a pardon has generally been regarded as blotting out the existence of guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense, it does not so operate for all purposes, and as the very essence of a pardon is forgiveness or remission of penalty, a pardon implies guilt; it does not obliterate the fact of the commission of the crime and the conviction thereof; it does not wash out the moral stain; as has been tersely said, it involves forgiveness and not forgetfulness."

In the Hughes case the Missouri Supreme Court cited with approval the case of State v. Hazzard, 247 Pac. 957 (Wash.), 47 A.L.R. 538, l. c. 541:

"In Baldi v. Gilchrist, 204 App. Div. 425, 198 N. Y. Supp. 493, a pardoned

felon was denied a license to operate a taxicab upon the ground that his previous conviction of crime established a bad character. The Supreme Court said:

"Respondent contends that, because he was pardoned by the Governor, no further consequences should follow his conviction of crime. But the executive act did not obliterate the fact of the conviction. As was said in *Roberts v. State*, 160 N. Y. 217, 54 N. E. 678, 15 Am. Crim. Rep. 561:

"It is manifest that the appellant's pardon and restoration to the rights of citizenship had no retroactive effect upon the judgment of conviction which remains unreversed and has not been set aside. We think the effect of a pardon is to relieve the offender of all unenforced penalties annexed to the conviction, but what the party convicted has already endured, or paid, the pardon does not restore. When it takes effect, it puts an end to any further infliction of punishment, but has no operation upon the portion of the sentence already executed. A pardon proceeds not upon the theory of innocence, but implies guilt."

"In *People ex rel. Deneen v. Gilmore*, 214 Ill. 569, 69 L.R.A. 701, 73 N.E. 737, it was held that a pardon issued to an attorney after conviction and sentence did not efface the moral turpitude established by conviction; the court saying: 'The crime of which the respondent was convicted and imprisoned in the penitentiary of the state of Missouri was an infamous offense, which involved not only moral turpitude, but also the lack of professional integrity. The conviction of that crime had the effect to degrade him, and to establish that he was of bad moral character as a

man and as a lawyer. The pardon granted him by the then acting Governor of the state of Missouri did not efface the moral turpitude and want of professional honesty involved in the crime, nor obliterate the stain upon his moral character.'"

We are not unmindful that there are cases that lean the other way, and argument that may be advanced contrary to this opinion, yet we cannot go in the face of the mandatory provisions of this statute in the absence of any section in the Missouri Real Estate Act which says that a pardon will relieve the mandatory provisions of same.

CONCLUSION

It is, therefore, our opinion, and our opinion is based on the particular case under consideration, that the mandatory provision of Section 14 of the Missouri Real Estate Act, supra, prevents the Missouri Real Estate Commission from granting a license to one who has been convicted of the crime of embezzlement, notwithstanding the fact that he has a pardon from the Governor.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

CRH:CP

SCHOOLS.: State Superintendent may revoke state teacher's
: certificate for any grounds mentioned in Sec.
: 10631, R. S. Mo. 1939, and he is not confined
: to grounds specified in Sec. 10599, R. S. Mo.,
: 1939.

June 17, 1944

Honorable Roy Scantlin
State Superintendent of Schools
Jefferson City, Missouri

7-3



Dear Mr. Scantlin:

This will acknowledge the receipt of your letter of June 12, 1944, requesting an opinion of this office, which is as follows:

"This department is confronted with the problem of the proper interpretation of the laws of this state applicable to the revocation of a teacher's certificate issued by the State Superintendent of Schools. Our particular case is one in which a teacher annuls a written contract with the board of education. The following sections of law which provide for the revocation of teachers' certificates do not seem to fully harmonize, and they require interpretation.

"1. Section 10631, R. S., Laws of Missouri, provides in part that the County Superintendent of Schools may revoke upon satisfactory proof any county certificate for incompetency, immorality, neglect of duty, or the annulling of written contracts with the board of directors without the consent of the majority of the members of the board which is a party to such contract. This law further provides that in case any person holding a certificate issued by the State Superintendent, the County Superintendent in the county where the offense is alleged to have been committed shall notify in writing such person issuing the certificate and that person shall proceed to revoke such certificate. You will observe this law provides specifically for the revocation of a certificate because of the annulling of the written contract with the board of education.

"2. Section 10499, R. S. 1939, Laws of Missouri, which authorizes the State Superintendent of Schools to grant certificates to teachers and also provides that such certificates may be revoked by the Superintendent of Schools for incompetency, cruelty, immorality, drunkenness, or neglect of duty. This law does not include the provision in Section 10631 which authorizes the revocation of a certificate because of the annulling of written contracts with the board of education. Also, two additional reasons for revoking certificates are included in this section which do not appear in 10631, namely, cruelty, and drunkenness.

"The specific problem at hand is whether or not the State Superintendent of Schools has the legal authority to revoke a teacher's certificate because of the annulling of a written contract with the board of education as provided for in Section 10631.

"I shall appreciate your advice and official opinion in answer to the following questions:

"1. Has the State Superintendent of Schools authority under the provisions of Section 10631 to take legal action in the revoking of a teacher's certificate issued by the State Superintendent of Schools because of the annulling of a written contract with the board of education when officially notified by the County Superintendent of Schools as provided by law?

"2. Even though Section 10599 which also authorizes the State Superintendent of Schools to revoke certificates does not include as one of the reasons for revoking the certificate the annullment of written contracts with the board of education, does it prevent the operation of Section 10631 in relation to the annullment of contracts? Can these two sections be harmonized and construed together?"

Section 10599, R. S. Mo., 1939 provides, in speaking of the powers of the state superintendent:

"* * * He shall also have authority to examine teachers and grant certificates of qualifications to those who pass a satisfactory examination, but the applicant shall not be charged any fee for such examination or certificate, nor shall the state superintendent receive any fee or compensation therefor; and any person holding such certificate from him shall be permitted to teach without further examination from other authorized examiners. Said certificates may be revoked by the state superintendent for incompetency, cruelty, immorality, drunkenness or neglect of duty."

Sec. 10631 Provides:

"The county superintendent may revoke, upon satisfactory proof, any county certificate for incompetency, immorality, neglect of duty, or the annulling of written contracts with the board of directors without the consent of the majority of the members of the board which is a party to such contract. All charges must be preferred in writing, signed and sworn to by the party or parties making the accusation, which must be filed with the county superintendent, and the teacher must be given due notice, of not less than ten days, an opportunity to be heard, together with witnesses. In case any person holding a certificate issued by the state superintendent, the board of curators of the state university, or the board of regents of any state teachers college, shall be complained of as herein provided for, then it shall be the duty of the county superintendent in the county where the offense is alleged to have been committed, to notify, in writing, the person or board issuing such certificate, and such person or board shall proceed as herein provided for the revocation of such certificate. The complaint must plainly and fully specify what incompetency, immorality, neglect of duty or other charge is made against the teacher, and if the county superintendent shall, after a hearing, revoke said certificate, the teacher shall have the right to appeal said hearing to the circuit court at any time within

June 17, 1944

ten days thereafter by filing an affidavit and giving bond as is now required before justices of the peace. On any such appeal the judge of the circuit shall, with or without a jury, at the option of either the teacher or the person making the complaint, hear the whole matter anew and decide the same de novo affirming or denying the action of the county superintendent, and he shall tax the cost against the appellant if the judgment of the county superintendent is affirmed, but if he disaffirms such judgment, then he shall assess the costs of the whole proceedings against the person or persons making the complaint. Any teacher having his or her certificate revoked by any other authority than that of county superintendent shall have the right to appeal therefrom to the circuit court and shall have the right to a like hearing and trial as is herein provided for in the appeal from the decision of the county superintendent."

This section specifically provides for action by the State Superintendent in case anyone holding a state certificate is complained of "as herein provided for." One of the grounds provided in this section is the annulling of written contracts with the board of directors without the consent of the majority of the board. This statute therefore specifically gives the State Superintendent authority to take legal action in the revoking of a teacher's certificate on that ground, and hence question number one in your letter must be answered in the affirmative.

With regard to the second question propounded in your letter it may be stated that the two statutes relate to the same subject matter and must be regarded in legal phraseology as being in *pari materia*.

The rule is that all acts in *pari materia* should be construed together. *Grimes v. Reynolds* 83 S.W. 1132; *Ackerman v. Green*, 100 S. W. 30. *Glaser v. Rothschild* 120 S. W. 1.

It has also frequently been held that the courts have a duty in construing two or more statutes relating to the same subject to read them together and to harmonize them if possible and to give force and effect to each and the rule applies not only to acts passed

at prior and subsequent sessions. State ex rel Central Surety Insurance corporation v. State Tax Commission 153 S. W. (2d) 43. See also State on Inf. Barker v. Koely, 192 S. W. 748; State v. Naylor, 40 S. W. (2d) 1079.

The provisions of Sec. 10599, relative to revocation first appeared in Sec. 3079, R. S. Mo. 1889. The provisions of Sec. 10631, first appeared in the Laws of 1901, p. 246.

Thus we see that Sec. 10599 for the purposes of the question here is some twelve years older than Sec. 10631.

It has been held that two statutes relating to the same general subject matter should be read together and harmonized if possible, with the view of giving effect to consistent legislative policy, but to the extent that statutes are necessarily inconsistent, a later statute which deals with common subject matter in a particular way will prevail over earlier statute of a more general nature. State v. Margiaracina, 125 S. W. (2d) 58. See also State vs. Crawford, 262 S. W. 341. There is no specific conflict on the face of these two statutes. Sec. 10599 does not say specifically that the causes mentioned therein are the only grounds on which the State Superintendent may revoke and therefore, under the rule of pari materia heretofore stated, the two statutes should be harmonized and the later section held to add a new ground for revocation. However, in any event, under the rule announced in the State v. Margiaracina case supra, it is difficult to see how provisions of Sec. 10631 can be avoided. It clearly is a later act and clearly deals in a much more specific fashion with the same subject matter as Sec. 10599. Its provisions therefore, would prevail under the rule laid down in the aforementioned decisions even in the event of an inconsistency between the two acts,

Hon. Roy Scantlin

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June 17, 1944

CONCLUSION.

It is, therefore, the opinion of this office that Sec. 10631, R. S. Mo., 1939, gives the State Superintendent the right to revoke, after proper hearing, state teachers' certificates for any and all grounds mentioned therein, and that he is not confined to the grounds set out in Sec. 10599, R. S. Mo., 1939.

Respectfully submitted

6
ROBERT J. FLANAGAN
Assistant Attorney General

RJF:LeC

APPROVED:

ROY MCKITTRICK
Attorney General

CITIES OF THE THIRD CLASS: 800 foot street improvement shall be done under Section 6989, R. S. Mo. 1939; owners of church property have right to file remonstrances.

August 24, 1944.

Mr. Harry J. Salsbury
Attorney at Law
Warrensburg, Missouri



Dear Sir:

This is to acknowledge your request for an official opinion of this office dated July 22, 1941, which is as follows:

"The Council of the City of Warrensburg, Missouri is desirous of widening a street here for a distance of less than 1200 feet, by extending the pavement laterally of 10 feet on one side of the street and 5 feet on the other side of the street. The abutting property owners consist of business property, church property and resident owners.

"The Council would like to know: 1. If a church property can remonstrate as provided for under Section 6988, R. S., if it does so through the action of its Board, and otherwise in a legal manner?

"2. The Council would further like an opinion on the legality of its proceedings to widen the street as mentioned above under the 1200 feet section. The said street to be widened is a long street of several blocks and the improvement of widening would connect at each end with paving. Thanking you for an early reply and with best wishes, I am,"

Section 6988, R. S. Mo. 1939, provides in part as follows:

"Before the city council shall be authorized under the provisions of section 6987, to grade or pave any alley, or to grade, pave or gutter the roadway part of any street, when the improvement is to be paid for with special tax bills, they shall, by resolution, declare that they deem such improvement necessary to be made, and shall cause such resolution to be published in some news-

paper printed and published in the city, for two consecutive insertions in a weekly paper, or seven consecutive insertions in a daily paper, and if a majority of the resident owners of the lands that would be liable for the cost of the improvement, at the date of the passage of the resolution, who shall own a majority of the front feet owned by residents of the city, abutting on the street or part of street proposed to be improved, shall not within ten days after the date of the last publication file with the city clerk their protest against such improvement, then the council shall have the power to cause the improvement to be made; * * *

This section was construed in the case of State v. Eberhardt, 189 S.W. 641, 1.c. 642, in the following words:

"On the question of the sufficiency of the remonstrance in point of number of remonstrators and amount of front footage represented by such remonstrators, appellants urge several objections to the counting of certain signers as lawful remonstrators as well as to the front feet owned by the remonstrators.

"It is first contended by appellants that the statute contemplates that only owners living on the street have a right to remonstrate. The statute should not be given any such restricted construction. The Supreme Court in the case of Miners' Bank v. Clark, 252 Mo. loc. cit. 30, 158 S.W. 597, 599, has held that:

"The statute in question gives the privilege of protesting to all persons within the city and owning property abutting the street sought to be improved."

"We therefore hold that any resident owner in Springfield, whether residing on or off the street to be improved, owning lands abutting the street, has a right to remonstrate under the statute (section 9255, R. S. 1909, as amended, Laws 1911, p. 340)."

Thus it would seem that any owner of abutting property would have a right to file a remonstrance.

In addition to the above, in the early case of Lockwood v. City of St. Louis, 24 Mo. 20, the Court held that church property

was liable to assessment for municipal improvements. We quote, l. c. 22 and 23:

"After directing the city to be laid off into sewer districts, with a view to a general plan of drainage, it provides that when a majority of the owners of real estate in any district shall apply for the construction of a sewer, the corporation is authorized to levy and collect for that purpose 'a special tax on the real estate within the district so drained,' 'not to exceed one half of one per cent. per annum on the assessed value of the real estate,' and to be 'annually levied and collected as other city taxes.' The question in the mind of the lawgiver was, whether this was a local improvement, and if so, upon what property the expense of constructing it ought to be assessed; and the legislature, having expressly laid the burden upon all the real estate within the district, without exempting any of it, the question is, whether an exemption ought to be implied by the courts in favor of church property, because by the city charter the general authority there given to levy and collect taxes is confined to 'property made taxable by law,' and by law church property is expressly exempted from state and county taxation. We think not. The words of the act import no such exempting, and the principle on which church property is exempted from contributing to the general expenses of the government, either state or municipal, is not applicable to a special assessment of this kind. * * *"

Thus it follows that if the property is liable to assessment, certainly the owners of the property would have a right to file a remonstrance.

Your second question relates to the manner in which the city should proceed in a case of this kind and we quote from Section 6989, R. S. Mo. 1939, which is in part as follows:

"When the council of any city of the third class shall deem it necessary to pave, macadamize, gutter, curb, grade or otherwise improve the roadway of any street or avenue for a distance not more than twelve hundred feet in length so as to connect at both ends with paving, macadamizing, guttering, curbing, grading or other improvement either on the same street or avenue or on other streets or avenues, or

on the same street or avenue and another street or avenue, the council shall declare such work to be necessary to be done and shall cause the same proceedings to be had as are provided in Section 6938, except that no protest may be filed. * * *

This section was challenged in the case of Stone v. City of Jefferson, 293 S.W. 780, 52 A. L. R. 879. The plaintiff in that case challenged the right of the City of Jefferson, Mo., to proceed under what is now Section 6939, holding that it denied here the constitutional right of petition. In upholding the statute the Court said, l.c. 782:

"The nature of a protest, as used in the statutes under review, is a matter of moment in determining whether there is merit in the plaintiff's contentions. At most a protest is but a statutory privilege and partakes in its nature of none of the essentials of an inherent right. It is perhaps more tedious than difficult to enumerate what these fundamental rights are. One of them, as the courts have frequently held, is the right to acquire, hold, enjoy, and dispose of property, real or personal. Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3230; Slaughter House Cases, 16 Wall. 75, 21 L. Ed. 394; Dutchess' Union Co. v. Crescent City Co., 111 U. S. 746, 4 S. Ct. 652, 28 L. Ed. 535; Blake v. McClung, 172 U. S. 239, 19 S. Ct. 165, 43 L. Ed. 432. No right of this character is violated in depriving the plaintiff of the privilege of protest in this proceeding.

"Although not entitled to the exercise of the privilege claimed on the ground that it does not involve an inherent or inalienable right, the futility of the plaintiff's contention is further demonstrated by the provisions of section 6325, which, in notifying the public of the proposed action of the council, states that 'any one desiring to do so may appear * * and' that 'he shall be heard, and the council shall * * state the result of such hearing.' In thus providing for a notice and a hearing, both of which the plaintiff has enjoyed, her contention as to a denial of due process of law is without merit. As we said in Gardner v. Robinson, 298 Mo. loc. cit. 610, 106 S.W. 646: 'Notice * * is * * the essence of due process of law.'

August 24, 1944

"It is further contended that section 8325 does not afford the plaintiff that equal protection of the law guaranteed by the federal Constitution. A statute does not conflict with this guaranty because it may be special in character or that certain persons may derive special benefits from its operation, if all persons within its purview are subjected to like conditions. *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S.E. 141, 12 A. L. R. 1121; *Virginia Development Co. v. Crozer Iron Co.*, 90 Va. loc. cit. 123, 129, 17 S. E. 806, 44 Am. St. Rep. 893; *Barbier v. Connolly*, 113 U. S. 27, 5 S. Ct. 357, 23 L. Ed. 923; *Strawberry Hill Land Corp. v. Starbuck*, 124 Va. 71, 97 S. E. 363. The sole ground upon which this contention is based is that the plaintiff was not afforded the right of protest. We have shown that this is not an inherent right but a mere privilege, the granting of which is vested in legislative discretion. That discretion not having been exercised, the plaintiff has no ground of complaint."

Conclusion

It is therefore the opinion of this office that the City of Warrensburg, Missouri, being a third class city has a right to widen the street 800 ft in length which intersects at each end with paved streets, under the provisions of Section 6989, R. S. Mo. 1939. It is further the opinion of this office that if church property abuts upon streets to be improved in said city, the owner or owners of said church property have the right to remonstrate in the same manner as any other resident property owner as provided in Section 6988.

Respectfully submitted

APPROVED:

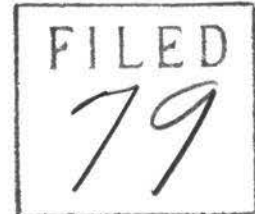
GAYLORD WILKINS
Assistant Attorney General

ROY McKITTRICK
Attorney General

GW.sc

INSURANCE: Approval of papers as to form and sufficiency submitted in connection with change of Articles of Incorporation of American Automobile Insurance Company.

February 7, 1944



Honorable Edward L. Scheufler
Superintendent
Insurance Department
Jefferson City, Missouri

Attention: Mr. Preston Estep, Counsel.

Dear Sir:

We have for attention your letter of January 28th, in which you request the opinion of this department as to the sufficiency and form of the amendment to the Articles of Incorporation of the American Automobile Insurance Company, St. Louis, Missouri, the amendment reading as follows:

"BE IT RESOLVED that Article Three of the Charter of American Automobile Insurance Company be amended by inserting a new paragraph between the last and next to the last paragraphs of said Article Three, as follows:

"To provide in any policies of insurance issued by it that the holders of such policies may from time to time participate in such dividends as may be declared by the Board of Directors out of the distributable net earnings of the Company.

"BE IT FURTHER RESOLVED that the officers and directors of the Company be authorized and directed to take all such steps, execute and file all such papers and pay all fees as may be deemed advisable in order to make such amendment effective."

We have examined the papers submitted in connection therewith, and are of the opinion that they are in proper

Hon. Edward L. Scheufler

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Feb. 7, 1944

form and are not in violation of the Constitution and
Laws of the State of Missouri, or of the United States.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

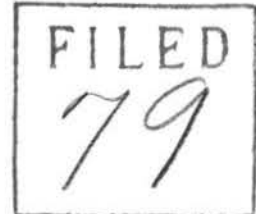
ROY McKITTRICK
Attorney-General

CRH:CF

INSURANCE: Approval of papers as to form and sufficiency
submitted in connection with the change of Articles
of Incorporation of Equity Fire Insurance Company.

February 7, 1944

Honorable Edward L. Scheufler
Superintendent
Insurance Department
Jefferson City, Missouri



Attention: Mr. Preston Estep, Counsel.

Dear Sir:

We have for attention your letter of January 28th, in which you request the opinion of this department as to the sufficiency and form of the amendment to the Articles of Incorporation of the Equity Fire Insurance Company, Kansas City, Missouri. This amendment is as follows:

"NINTH. The said corporation shall operate upon the stock insurance plan and may issue policies upon both a participating basis and a non-participating basis. The Board of Directors shall have power and authority to permit the policyholders of the corporation from time to time to participate in the profits of its operations through distributions to policyholders, and for the purpose of carrying this provision into effect may from time to time make reasonable classification of policies and risks."

We have examined the papers submitted in connection therewith, and are of the opinion that they are in proper form and are not in violation of the Constitution and Laws of the State of Missouri, or of the United States.

Respectfully submitted,

APPROVED:

COVELL R. HEWITT
Assistant Attorney-General

ROY McKITTRICK
Attorney-General

CRH:CP

INSURANCE: Approval of papers as to form and sufficiency submitted in connection with the change of Articles of Incorporation of the Central Mutual Casualty Company of Kansas City, Missouri, organized under Article 7, Chapter 37, R. S. Mo. 1939.

March 17, 1944

3/20



Honorable Edward L. Scheufler
Superintendent
Insurance Department
Jefferson City, Missouri

Attention: Mr. Preston Estep, Counsel.

Dear Sir:

We have for attention your letter of March 10th, in which you request the opinion of this department as to whether the proposed amendment submitted therein complies with the Laws of the State of Missouri and is consistent with the Constitution of the State of Missouri and with the Constitution of the United States; being an amendment to the Articles of Incorporation of the Central Mutual Casualty Company of Kansas City, Missouri, which corporation is organized under the provisions of Article 7, Chapter 37, R. S. Mo. 1939, as a mutual insurance company.

We have examined the papers submitted in connection therewith, and are of the opinion that they are in proper form and not in violation of the Constitution of the United States, the Constitution of Missouri, nor the Laws of Missouri.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

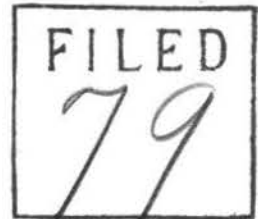
ROY MCKITTRICK
Attorney-General

CRH:CP

INSURANCE DEPARTMENT: Insurance Companies may take credit
IMPOUNDED FUNDS: in their 1943 tax return under Sections
6094, 6095, R. S. Mo. 1939, for impound-
ings ordered returned to policyholders.

March 31, 1944

Hon. Edward L. Scheufler
Superintendent of Insurance
Jefferson City, Missouri



Dear Sir:

We have for attention your letter of March 29th, 1944, in which you request the opinion of this department, and attached to your letter is a letter, dated March 29th, 1944, from Mr. Homer H. Berger, attorney for the insurance companies involved in your request.

From the two letters we have the statement, and, upon the assumption of the correctness of the facts therein stated we base our opinion; the letters reading as follows:

Your letter:

"A number of stock fire insurance companies, parties to the Federal 16-2/3% rate case, have included in their Premium Tax Returns for the year 1943 the amount of impoundments held to belong to the policyholders by the Federal Court. These returns are filed pursuant to Section 6095, Article 12, Chapter 37, Revised Statutes of Missouri, 1939, and credit is sought to be taken under the provisions of Section 6094, Article 12, Chapter 37, R. S. Mo. 1939.

"Transmitted herewith is a copy of a letter from Mr. Homer H. Berger, Counsel for the fire insurance companies claiming credit as above stated, which sets forth the position the companies are taking in regard to this matter.

"Will you please advise this Department whether or not stock fire insurance companies, parties to the Federal 16-2/3% rate case, can take credit under the provisions of Section 6094, R. S. Mo. 1939, for the impounded funds in their Premium Tax Returns for the year 1943?"

Mr. Berger's letter:

"With reference to your letter of March 9, 1944, addressed to the Stock Fire Companies filing tax schedules for the year 1943 in Missouri, claiming credit for impounded premiums,

"On behalf of these companies we desire to assert their right to claim as credit on their 1943 tax schedules the impounded premiums that were ordered by the federal court to be returned to the policyholders and belonging to policyholders under the decree of August 14, 1940, which became final January 12, 1943. These funds were deposited with the Custodian of the Court under an interlocutory injunction dated July 3, 1930. In 1931 the Insurance Department ruled that these companies must include in their tax returns for 1930 and the years during which impoundings were made the funds impounded. This was done and tax paid thereon.

"In 1936 following the entry of the decree of February 1, 1936, which distributed the impounded funds 20% to the policyholders and 80% to the companies on policies effective prior to May 1, 1935, and 33 1/3% to the policyholders and 66 2/3% to the companies on policies effective after May 1, 1935, the companies took credit for the 20% and 33 1/3% paid to the policyholders in their 1936 tax return.

"The amount claimed in the 1943 return is the balance of these impounded funds which the Court in the decree above referred to in 1940 found to be owned by the policyholders.

"We submit that in 1943 when this decree of 1940 became final that the balance of the funds in the hands of the Custodian became the property of the policyholders and was paid to them though they are not now actually yet in possession.

"As the matter stands under the decision of the Federal Court, these funds were never premiums in the hands of the companies and now belong to the policyholders.

"We are advised that as to the 10% excess collections these were taken as credit on tax returns by the companies in 1929, 1930, 1931, 1934 and 1935, and the companies involved in the 16 2/3% rate litigation in the American Constitution Case, those funds were taken as a credit in 1938. So the interpretation of the Department at all times has been to permit the impounded funds when determined by the Court to belong to the policyholders as deductions in the year of determination as cancelled and returned premiums.

"We have not been able to find any decision squarely in point dealing with impounded funds. We feel, however, that State ex rel National Life Ins. Co. vs Hyde, 292 Mo. 342 is exactly in point and the theory upon which that case is decided is equally applicable here.

"In view of the fact that under Section 6095 the State Treasurer collects these taxes, we are urgently requesting that you submit to the Attorney General of Missouri this question being whether the companies can take

as a credit under Section 6094 the impounded funds in their premium tax returns for 1943."

The question is as stated in the last paragraph of your letter, viz:

"Will you please advise this Department whether or not stock fire insurance companies, parties to the Federal 16-2/3% rate case, can take credit under the provisions of Section 6094, R. S. Mo. 1939, for the impounded funds in their Premium Tax Returns for the year 1943?"

The only question involved in your request is whether the Superintendent of Insurance is legally authorized to give credit to approximately twenty-three of the insurance companies, in their 1943 premium tax return to be made in March, 1944, in compliance with Sections 6094, 6095, R. S. Mo. 1939, as returned premiums, the amount of impounded fund ordered to be paid to the policyholders by the Federal Court in a decree that became final January 12, 1943.

It is provided in Section 6094, supra, that "fire and casualty insurance companies or associations shall be credited with cancelled or return premiums actually paid during the year in this state." Does the impounded funds ordered to be paid by the insurance companies to the policyholders come within the meaning of the term "return premiums" as used in Section 6094, supra?

It is a cardinal rule of law that taxing statutes are to be strictly construed in favor of the taxpayer, and this rule was applied to the above section in *State ex rel. National Life Insurance Co. v. Hyde*, 292 Mo. 342. We think that Section 6094, supra, means, and it was the intention of the Legislature, that the insurance companies should pay a tax on the premiums that were actually received by the companies and should not be compelled to pay the tax on sums not actually received and kept by them.

We have not been able to find a case on all fours on the question involved, and it is only by analogy that we have arrived at a conclusion.

In the case of State ex rel. National Life Insurance Co. v. Hyde, 292 Mo. 342, 1. c. 349, the court said:

"The court holds that such moneys not actually devoted as premiums to the business of the insurance company for the current year in which they are collected, but which are returned or otherwise abated or credited to the policyholders' account, are not subject to the two per cent tax enacted upon premiums received during the year."

(Italics ours.)

Also, in the case of Equitable Life Assurance Society v. Hobbs, 127 Pac. (2d) 477, 155 Kans. Rep. 534, 1. c. 539, the court said:

"The question of the right to deduct from premiums paid during a particular year any refunds of the consideration on cash refund annuity contracts is limited to that class of contracts, and not to all contracts for annuities. In the original hearing this court held that the considerations paid for such contracts were premiums under the act above mentioned providing for the tax. If the payments made were premiums for assessing tax, the portion not retained by the company but returned to the policyholder or the person designated by him was a proper item for deduction under the reasoning and holding in State, ex rel., v. Wilson, 102 Kan. 752, 172 Pac. 41. The parties are directed to make settlement consistent with the views herein expressed."

The above cases hold that the insurance companies should pay a tax only on the amounts actually received and retained by the companies and should not pay a tax on that part of the premium which is paid back to the policyholder. In other words, they are only required to pay a tax on the net premiums and not on the sums that may be returned to the policyholders by way of return premiums or dividends.

We think January 12, 1943, fixes the date on which the impounded funds became the absolute property of the policyholders, by reason of decree of the Federal Court becoming final on that date, and the insurance companies would be entitled to take credit in their March 1944 return to the Insurance Department. When the impounding began in 1930, under injunction order of the Federal Court, the Insurance Department ruled that the impoundings were premiums for assessing premium tax. In 1936 the Federal Court, by decree, ordered paid to the policyholders a portion of these impounded funds. Credit was taken by the companies in their 1936 tax return for the amount so returned. The amount being claimed as credit now is the balance of these impounded funds.

CONCLUSION

It is, therefore, our opinion that the stock fire insurance companies, which were parties to the Federal 16 2/3% rate case, may take credit under the provisions of Section 6094, R. S. No. 1939, for the impounded funds in their premium tax returns for the year 1943.

Respectfully submitted,

COVELL R. HEWITT

RALPH C. LASHLY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH/RCL:CP

INSURANCE: Approval of proceedings at meeting of stockholders and directors of St. Louis Fire and Marine Insurance Company, increasing capital stock and number of directors and reducing par value of common stock.

May 3, 1944.

53



Honorable Edward L. Scheufler
Superintendent
Insurance Department
Jefferson City, Missouri

Attention: Mr. Preston Estep,
Counsel

Re: St. Louis Fire and
Marine Insurance Com-
pany, St. Louis,
Missouri - Proposed
amendment to charter

Dear Mr. Scheufler:

We have your letter of April 26, 1944, for our attention, together with enclosure of certified copy of proceedings at meeting of stockholders and of directors of the St. Louis Fire and Marine Insurance Company, held April 19, 1944, at which the capital stock of said company was increased, par value of its common stock reduced, and number of directors was increased.

We have examined the proceedings as set forth in the certified copy and are of the opinion that they are in proper form and not in violation of the Constitution of the United States, the Constitution of Missouri, nor of the laws of Missouri.

Respectfully submitted,

RALPH C. LASHLY
Assistant Attorney-General

APPROVED:

VANE THURLO
Acting Attorney-General

RCL:EG

INSURANCE: Approval of proceedings at the meeting of stockholders of Central Surety and Insurance Corporation, amending Article 3 and repealing Article 6 of the Articles of Incorporation.

May 5, 1944.



Honorable Edward L. Scheufler
Superintendent
Insurance Department
Jefferson City, Missouri

Attention: Mr. Preston Estep,
Counsel

Re: Central Surety and Insurance Corporation, Kansas City, Mo. - Proposed charter amendment.

Dear Mr. Scheufler:

We have your letter of May 5, 1944, for our attention, together with enclosed certified copy of the proceedings at a regular meeting of the stockholders of the Central Surety and Insurance Corporation on May 2, 1944, at which meeting Article 3 of the Articles of Incorporation was amended, and Article 6 thereof was repealed.

We have examined the proceedings as set forth in the certified copy and are of the opinion that they are in proper form and not in violation of the Constitution of the United States, the Constitution of Missouri, nor of the laws of Missouri.

Respectfully submitted,

RALPH C. LASHLY
Assistant Attorney-General

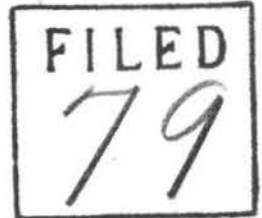
APPROVED:

VANE THURLO
Acting Attorney-General

RCL:EG

INSURANCE: Approval of proceedings at meeting of stockholders of Central Surety Fire Corporation, amending Article 3 and repealing Article 6 of the Articles of Incorporation.

May 5, 1944.



Honorable Edward L. Scheufler
Superintendent
Insurance Department
Jefferson City, Missouri

Attention: Mr. Preston Estep,
Counsel

Re: Central Surety Fire Corpora-
tion, Kansas City, Missouri -
Proposed amendment of charter

Dear Mr. Scheufler:

We have your letter of May 5, 1944, for our attention, together with enclosed certified copy of proceedings at a regular meeting of the stockholders of the Central Surety Fire Corporation, held May 2, 1944, at which meeting Article 3 of the Articles of Incorporation was amended and Article 6 of the Articles of Incorporation was repealed.

We have examined the proceedings as set forth in the certified copy and are of the opinion that they are in proper form and not in violation of the Constitution of the United States, the Constitution of Missouri, nor of the laws of Missouri.

Respectfully submitted,

RALPH C. LASHLY
Assistant Attorney-General

APPROVED:

VANE THURLO
Acting Attorney-General

RCL:EG

INSURANCE: Approval of Amendment to Articles of Incorporation
of Utilities Insurance Company, St. Louis, Mo.

May 9, 1944

5/10
FILED
79

Honorable Edward L. Scheufler
Superintendent
Insurance Department
Jefferson City, Missouri

Re: Amendment of
Articles of Incorporation of Utilities Insurance Co.
St. Louis, Mo.

Attention: Mr. Preston Estep, Counsel

Dear Sir:

We have your letter of May 9th, 1944, enclosing for our attention Certificate of Amendment of Articles of Incorporation Increasing number of Directors from 13 to 15, which you have submitted to the Attorney General for his examination.

We have examined same and find that the Amendment to the Articles of Incorporation have been adopted regularly and that the proposed Amendment is consistent with the Laws of the State and the Constitution of the United States.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

VANE C. THURLO (Acting)
Attorney General

CRH:CP

LIQUOR.

County must pro rate license tax for
period less than full license year
as State is required to do under
Sec. 4897, R. S. Mo., 1939.

June 3, 1944



Honorable Theodore R. Schneider
Prosecuting Attorney, Bates County
Butler, Missouri

Dear Mr. Schneider:

This will acknowledge the receipt of your letter
of May 26, 1944, requesting an opinion of this office,
which is as follows:

"The question has arisen as to whether the
county can pro-rate the amount of its liquor
licenses. Section 4897 of the statutes pro-
vide for the period of the license and permits
pro-rating on the remaining months or parts of
months during the year. Section 4898 provides
for the amount of the licenses and Section 4904
provides for the amounts to be charged by the
county and city limiting the amount charged to
not exceeding one and one and one half times
respectively of the state license.

"My interpretation, therefore, is that the
counties and cities are required to pro-rate
their licenses on the monthly basis or else they
would be exceeding the amount for a period less
than a year as limited by Section 4904.

"Will you kindly favor me with your opinion as
to whether or not the county and city must pro-
rate their license on the monthly basis as does
the state. "

Sec. 4897, R. S. Mo., 1939, provides:

"On approval of the application and payment of
the license tax herein provided, the supervisor
of liquor control shall grant the applicant a
license to conduct business in this state for

June 3, 1944

a term to expire with the thirtieth day of June next succeeding the date of such license. A separate license shall be required for each place of business. Of the license tax to be paid for any such license, the applicant shall pay as many twelfths as there are months, (part of a month counted as a month) remaining from the date of the license to the next succeeding July 1st. * * *"

Thus we see that where an applicant applies for a license in August or some succeeding month after the license period begins on July 1st, the state must pro-rate the license to cover as many twelfths as there are remaining up to the next July 1st.

Sec. 4904 R. S. Mo., 1939, provides:

"In addition to the permit fees and license fees and inspection fees by this act required to be paid into the state treasury, every holder of a permit or license authorized by this act shall pay into the county treasury of the county wherein the premises described and covered by such permit or license are located, or in case such premises are located in the city of St. Louis, to the collector of revenue of said city, a fee in such sum (not in excess of the amount by this act required to be paid into the state treasury for such state permit or license) as the county court, or the corresponding authority in the city of St. Louis, as the case may be, shall by order of record determine, * * *" (Underscoring ours).

Therefore, the county for the same period cannot charge a tax in excess of that charged by the state. The state must pro-rate the tax where the license will cover less than the full license year. To allow the county to charge the full tax in a case such as this would be to allow the county to charge a tax in excess of that charged by the state for the same period. It must, therefore, follow that where a person applies to the county for a license for a period less than the full license year the county must pro-rate the tax as the state is required to do under Sec. 4897 supra.

Hon. Theodore R. Schneider -3-

June 3, 1944

CONCLUSION.

It is, therefore, the conclusion of this office that where a person applies to a county for an intoxicating liquor license under Sec. 4904, R. S. Mo., 1939, for a period less than the full license year, the county must pro-rate the tax as the state is required to do under Sec. 4897, R. S. Mo., 1939.

Respectfully submitted,

ROBERT J. FLANAGAN
Assistant Attorney General

RJF:LeC

APPROVED:

ROY McKITTRICK
Attorney General.

INSURANCE: Approval of Amendment to Articles of Association
of Old American Insurance Company, a corporation,
of Jackson County, Missouri.

August 22, 1944

Hon. Edward L. Scheufler
Superintendent
Insurance Department
Jefferson City, Missouri

Attention: Mr. Arthur R. Thompson, Jr.

Dear Sir:

8-22
FILED
79

Re: Amendment of Articles
of Association of Old
American Insurance
Company, a corporation,
of Jackson County, Mo.

We have for consideration, your letter of August 18th, in which you enclose for our approval Certificate of Amendment to Articles of Association of Old American Insurance Company, a corporation, of Jackson County, Missouri, together with a copy of the publication and affidavit of publication, in connection therewith.

We have examined the Amendment to the Articles of Association of the above company and find that the Amendment is in accordance with the provisions of the statutes of Missouri, and particularly, Article 2, Chapter 37, Revised Statutes of Missouri, 1939, and is not inconsistent with the Constitution and Laws of the State of Missouri and of the United States.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

CRH:CP

SCHOOLS:
MISSOURI SCHOOL FOR THE DEAF:

Pupil cannot be excluded because he refuses to submit to medical treatment but can be excluded temporarily to prevent spread of contagious diseases.

November 21, 1944

Board of Managers
Missouri School for the Deaf
Fulton, Missouri

11/27
FILE

79

Attention: Mr. Truman L. Ingle

Gentlemen:

We have your letter of recent date submitting to this department a situation which has arisen in your school and in connection with which you desire the opinion of this office. Your letter reads as follows:

"At the opening of the Fall semester, Mrs. Opal Willoughby returned her little son, Jerry, to school. When she registered him, she informed me that due to the fact that she is a Christian Scientist that no medicine was to be given to Jerry and that the only medical attention he should have would be dental care and the setting of a bone if broken. Mrs. Willoughby's request was that I telephone or telegraph her if Jerry should become ill. Upon receiving such information, Mrs. Willoughby informed me a Christian Science practitioner in her home town, Springfield, would assume the responsibility of his treatment according to Christian Science methods.

"Being unwilling to assume the responsibility for Jerry in case of illness, I told Mrs. Willoughby that I would upon written request from her, present the matter to our Board of Managers. Mrs. Willoughby informed me that under the law I could not deny her youngster the services of a Christian Science practi-

November 21, 1944

tioner and that we had no right to force on him the treatment of an M. D. I told Mrs. Willoughby that I knew of no such law and if there was one, I would like to see it. Upon her return home, Mrs. Willoughby evidently got in touch with certain people connected with the Christian Science Church of Missouri and forwarded to me the enclosed literature and letter, together with the letter from her which also is enclosed.

"This entire situation was presented to the Board of Managers at their regular meeting yesterday. After careful thought and consideration, the Board of Managers instructed me to write you, asking you for an opinion as to whether or not we must refrain from giving this child medical attention as requested by Mrs. Willoughby, if the child remains in school.

"The board further desires an opinion as to whether or not it has the authority, if your opinion in regard to medical care is that we must acquiesce to Mrs. Willoughby's request, to remove the child from school and return him to his home.

"We will appreciate it very much if you will render the opinions as requested above by the Board of Managers of the Missouri School for the Deaf."

The statutes relating to the Missouri School for the Deaf are found in Article 25, Chapter 72, R. S. Missouri 1939, along with statutes relating to the Missouri School for the Blind. Section 10846 of said statutes provides as follows:

"The government of each of these schools shall be vested in a board of managers, composed of five members, appointed by the governor with the consent of the senate.* * * *"

Section 10847, R. S. Missouri 1939, provides that:

"The board of managers of each of said schools shall elect the superintendent and all teachers and officers of said school and prescribe the number to be employed therein, and fix their terms of office and the amount of compensation for their services. * * * * *

The foregoing powers and the other powers set forth in other statutes of said article show that the Board of Managers of the Missouri School for the Deaf stands as to that school in the same position as does a board of directors of a public school for other children. The courts have not had occasion to pass upon the powers of the Board of Managers of the Missouri School for the Deaf, but our courts have passed upon the powers of directors of general public schools. We think the rules applicable to school boards of ordinary public schools are determinative of the powers of the Board of Managers of the Missouri School for the Deaf. This, because the powers of said Board of Managers are generally similar to those of ordinary public school boards. Furthermore, by Section 1, Article XI, Constitution of Missouri, the General Assembly is required to "establish and maintain free public schools for the gratuitous instruction of all persons in this state between the ages of six and twenty years." Deaf persons between the ages of six and twenty years are thus included in the educational program of the state. Furthermore, by Section 10853 of the statutes, all deaf persons under twenty-one years of age are given the right to attend the Missouri School for the Deaf. There is no reason to assume that because a pupil is deaf and, therefore, required to attend a special school, he should be dealt with or treated any differently as to his personal rights than the child who attended other public schools. For these reasons we shall look to the law as to the powers of school boards generally to control pupils in public schools to help determine what powers the Board of Managers of the Missouri School for the Deaf have in the same field.

I.

Can the board of directors or managers of a public school compel a child to submit to medical treatment?

In the recent case of Harfst v. Hoegen, 163 S. W. 2d 609, the Supreme Court of Missouri had before it the

question of the right of a school board to use public funds to support a school in which certain religious practices were indulged in and certain religious teachings were given to the pupils. The court went into the question of the guarantee of religious freedom, and in the course of the opinion, 1. c. 613, the court said:

"* * * By the common law, control of children is parental and the father could 'delegate part of his parental authority to the tutor or school-master,' said Blackstone, 1 Com. 452, 3. Now by statute the school board has been given certain powers, and it behooves the board to point to a statute, when its will and that of the parent conflict. * * * * *

Also, in the case of Wright v. Board of Education, 295 Mo. 466, 474, the court said:

"* * It is therefore within the purview of legislative power to enact any laws not in violation of individual rights, defining the power and duty of boards of education and enacting such laws as the General-Assembly may deem proper for the control and management of the schools. The Legislature, however, in its wisdom, contrary to the course pursued in some other jurisdictions, has deemed it proper to prescribe only in the most general terms the powers to be exercised by such boards, and the regulations for the control of the schools and those attending same."

In the case you submit, the will of the Board of Managers conflicts with that of the parent of the pupil. Is there a statute to which the Board of Managers can point to support its position?

We find no specific statute authorizing the Board of Managers of the Missouri School for the Deaf nor the Board of Directors of any public school to require pupils to submit to medical treatment. Unless, therefore, there are some general statutes which grant such boards that power, the power does not exist.

There are numerous general statutes with respect to the powers of directors of public schools. For instance, Section 10340, R. S. Missouri 1939, reads as follows:

"The board shall have power to make all needful rules and regulations for the organization, grading and government in their school district-- said rules to take effect when a copy of the same, duly signed by order of the board, is deposited with the district clerk, whose duty it shall be to transmit forthwith a copy of the same to the teachers employed in the schools; said rules may be amended or repealed in like manner. They shall also have the power to suspend or expel a pupil for conduct tending to the demoralization of the school, after notice and a hearing upon charges preferred, and may admit pupils not residents within the district, and prescribe the tuition fee to be paid by the same, except as provided for in Section 10458, R. S. 1939: * * * * *

It might be suggested that the foregoing statute, which authorizes the board to make all needful rules and regulations for the government of the school, is broad enough to authorize a rule or regulation requiring a pupil to submit to medical treatment when in the judgment of the board the child needs such treatment.

The case of Wright v. Board of Education, supra, discusses the effect of such general statutes. In that case, l. c. 475, the court said:

"* * * In addition, a general statute affords more opportunity for such an interpretation as will result in denying to no pupil any of the advantages to be derived from the system, unless there exists cogent reasons therefor.

"What constitutes such reasons may, as a general rule, be left, on account of the general character of the statute,

to the discretion of the board. * *"

The question in that case was whether the directors had exceeded their discretion in making a certain rule, and the court held that the directors had exceeded such discretion. In that case the court was considering a general statute similar to Section 10340, supra, in connection with a rule of a school board denying to pupils who belong to certain secret organizations the privilege of participating in graduating exercises and honors. In discussing the rule of the board the court said, l. c. 478:

"There is nothing shown as to the conduct of the pupils alleged to be within the purview of the rule to support the conclusion that their membership in the societies designated has proved detrimental to the operation and control of the school. In the absence of such evidence the reason for the rule, so far as this case is concerned, ceases to exist."

It will be seen by the foregoing that the court held that unless the thing ruled against was something which was detrimental to the operation and control of the school, the rule could not be justified. The court then discussed numerous cases where the courts had ruled upon the extent of the power of school boards to control the pupils of the school, and concluded as follows, l. c. 482:

"The lack of power of the board to adopt the rule in question, having been demonstrated, a discussion of its discretion is rendered unnecessary. Either by reasonable implication or direct expression, the limits of that discretion may be readily determined from what has heretofore been said. It will suffice, therefore, to say it should extend no further than may be found reasonably necessary to promote the intelligent conduct and control of the school, as such, within the domain we have defined. Any other interpretation would remove all limit to the exercise of discretionary power, leaving it to the judgment, whim or caprice of each succeeding board. We have not reached that point in the interpretation of a delegated power where,

with a proper regard for the rights of citizens and the rules of construction, we feel authorized in holding, as was held in Wayland v. Board, supra, that the board's power is to be limited only by its discretion ~~free~~ from any determination by the courts."

From the above we conclude that the power of the board of directors of a public school to make rules as to the government of the school and the pupils attending it extends "no further than may be found reasonably necessary to promote the intelligent conduct and control of the school." Our question, therefore, resolves itself to a question of whether to allow a pupil to refuse medical treatment would tend to interfere with the intelligent conduct of the school. That is to say, if a pupil gets sick and his parents refuse to allow him medical attention, is the conduct and operation of the school interfered with? Perhaps the child might die, but would that interfere with the conduct and operation of the school? In other words, would the school go on in a normal manner regardless of how much the child suffered or even if the child died?

We think that the discretion of a school board does not extend to controlling the personal treatment of pupils in case of illness. The sickness of a child in school would be endured outside the schoolroom and hence could not interfere with the conduct of the school. In fact, the parent involved in your present case has given permission that her child may be taken to the hospital if he becomes ill. He would thus be removed from the schoolroom and what kind of treatment he received for his illness at the hospital could not interfere with the conduct of the school.

We think our conclusion will be further supported by reference to statutes which give specific authority with respect to the personal health and well being of school children. Section 9738 of the statutes creates the division of Child Hygiene in the State Board of Health and specifically authorizes such division to supervise and regulate the physical inspection of school children in the public schools of the state, but said statute contains the following limitation upon such power:

"* * * Provided, that no private examination or treatment of any school child shall be made except after notice to, and by consent of, the parent or guardian of such child."

Also, Section 10521 of the statutes provides for a supervisor of physical education in certain schools and authorizes him to assist in the physical examination of the pupils. Said section requires said supervisor to "report the findings of the physical examination of any child to its parent or guardian and may make such recommendations to promote the correction of defects or the amelioration of impairments as is deemed necessary. * * " Said provision clearly shows that the power of such supervisor is limited to examining pupils and reporting the condition to the proper parent or guardian with recommendations. Said section further authorizes school boards in certain schools to "employ, or otherwise provide or secure the service of, a supervisor of health and of one or more school nurses, * *" who shall serve under the supervisor of physical education if so delegated by the superintendent in charge. After granting the foregoing powers as to physical examination, said section provides as follows:

"* * * It is provided that this article shall not be construed to require any school child to undergo private examination or medical treatment recommended by the supervisor of physical education, or health supervisor, or by any other person who may have conducted the physical examination of the school child, without the consent of its parent or guardian."

The foregoing statutes clearly show that the Legislature does not intend to require school pupils to submit to medical treatment without the consent of their parents. If the Legislature would not allow compulsory medical treatment of school children when dealing specifically with the question of their health by special statutes, it certainly could not be contended the Legislature, by a general statute dealing with the general powers of a school board, intended to permit such boards to require a pupil to submit to medical treatment.

CONCLUSION

It is, therefore, the opinion of this department that the Board of Managers of the Missouri School for the Deaf cannot require a pupil to submit to medical treatment in the absence of the consent of the parent or guardian of such pupil.

II.

Can the Board of Managers of the Missouri School for the Deaf expel a pupil and return him to his home because his parent will not consent that in case the pupil becomes ill the school authorities can cause medical treatment to be administered to him?

From what we have said above, we think it is evident that you cannot deny a pupil the right to attend the school because you cannot procure permission of his parent for the school authorities to cause medical treatment to be administered to such pupil in case he becomes sick. Since the Board of Managers, as pointed out above, has not the power to compel the pupil to submit to medical treatment, it must follow that such board cannot refuse to allow the pupil to attend the school because he will not in advance agree to submit to a rule which the Board has no authority to make. Section 10853, supra, provides that all deaf persons under twenty-one years of age who are residents of the state and who have suitable mental and physical capacity shall be entitled to attend a school for the deaf. Evidently the pupil involved in your present case has all of these qualifications.

It should be pointed out perhaps that there are cases in which a pupil may be excluded from school temporarily because of a contagious disease. In the case of ordinary public schools, Section 10341 of the Statutes specifically authorizes school boards to exclude from school a pupil who has a contagious disease so long as there is any liability of such disease being transmitted by such child to other children. It will be noted, however, that such section does not authorize the school board to cause medical treatment to be administered to the pupil, but it merely authorizes the board to keep the child out of school until such time as the danger of his infecting other children has passed. There is no statute giving such specific power to the Board of Managers of the Missouri School for the Deaf. However, we think such Board has that power under the general powers granted to it as set out in the first part of this opinion. The government of this school is vested in the Board of Managers. Such a general grant of powers, as was shown in the first part of this opinion, includes the power to do whatever is reasonably necessary to prevent interference with the conduct of the school. To allow pupils to attend who have contagious diseases would certainly scatter the disease to other pupils and thus interrupt the conduct of the school. It would, there-

fore, be necessary to prevent such pupil from attending school until the danger of transmitting the disease had passed in order to keep the school going on any intelligent basis.

In the case of State ex rel. v. Cole, 220 Mo. 697, the court had before it a rule of a school board which excluded pupils who had not been vaccinated against smallpox. The authority for the board making such a rule was claimed under general statutes vesting in the Board the government of the school and giving the power to make needful rules and regulations for the government of the school. In passing on the validity of the rule, the court said, l. c. 706:

"By section 9759, supra, the government and control of the district is vested in the board of directors. We have here a broad and general grant, as do we also in section 9764, supra. We have no doubt that in the event of a threatened epidemic of smallpox such boards can pass a rule excluding all pupils who have not been vaccinated. That a person who has never been vaccinated is subject to the contagion of smallpox is general knowledge. That vaccination has reduced the ravages of this disease is also general knowledge. That the appearance of unvaccinated pupils in a public school at a time of a smallpox epidemic, would tend to break up and disorganize a public school, is unquestioned. That the school board has the power to absolutely suspend the school during epidemics of contagious or infectious diseases, we think can hardly be questioned. No court would compel the opening of a school under such circumstances. The power here exercised was a very similar power, and if these rules are reasonable, we see no reason why their enforcement should be prohibited."

After discussing numerous decisions from other states the court then said, l. c. 716:

November 21, 1944

"We are of the opinion that the school boards of Missouri have the right to enact and enforce rules of the character here in question at all times whenever there is either a smallpox epidemic in the district, or whenever there is a threatened smallpox epidemic.

"The very purpose of such regulations might be thwarted were we to actually await the epidemic itself."

We think the reasoning of the court in the above case, when applied to the general statutes relating to the powers of the Board of Managers of the Missouri School for the Deaf, would lead to the conclusion that such Board would have power to exclude pupils who have contagious diseases until the danger of transmitting same to the other pupils has passed, and, under proper circumstances to exclude pupils who refuse to be vaccinated against contagious diseases. When the circumstances under which refusal to be vaccinated would warrant the exclusion of pupils and for how long such exclusion could be enforced would have to be determined by the facts and circumstances in each particular case.

CONCLUSION

It is, therefore, the opinion of this department that the Board of Managers of the Missouri School for the Deaf cannot exclude a pupil and return him to his home because his parent will not agree that such pupil shall receive medical treatment in case he becomes ill from sickness or disease. This conclusion does not mean that such Board cannot exclude a child temporarily because he has a contagious disease or is threatened with a contagious disease under circumstances which would make him a threat to the health of other pupils.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

HHK:DA

INSURANCE: Approval of Amendment to Articles of Association
of Reserve Mutual Fire Insurance Company, a corpora-
tion, of Missouri.

November 21, 1944

Honorable Edward L. Scheufler
Superintendent
Insurance Department
Jefferson City, Missouri



Attention: Mr. Arthur R. Thompson, Jr.

Dear Sir:

Re: Amendment of Articles
of Association of
Reserve Mutual Fire
Insurance Company, a
corporation of Missouri.

We have for attention your letter of November 20th, 1944, in which you enclose for our approval Certificate of Amendment to the Articles of Association of Reserve Mutual Fire Insurance Company, in which it desires to change its name to Old American Mutual Fire Insurance Company; together with a copy of the publication and affidavit thereof, in connection therewith.

We have examined the Amendment to the Articles of Association of the Reserve Mutual Fire Insurance Company and find that the Amendment is in accordance with the provisions of the statutes of Missouri, and is not inconsistent with the Constitution and Laws of the State of Missouri and of the United States.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

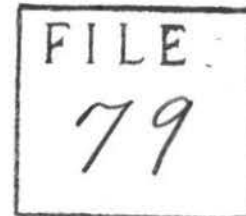
ROY MCKITTRICK
Attorney General

CRH:CP

INSURANCE: Approval of Amendment to Articles of Association
of Reserve Mutual Casualty Company, a corporation,
of Missouri.

November 21, 1944

Honorable Edward L. Scheufler
Superintendent
Insurance Department
Jefferson City, Missouri



Attention: Mr. Arthur R. Thompson, Jr.

Dear Sir:

Re: Amendment of Articles
of Association of
Reserve Mutual Casualty
Company, a corporation
of Missouri.

We have for attention your letter of November 20th, 1944, in which you enclose for our approval Certificate of Amendment to the Articles of Association of Reserve Mutual Casualty Company, in which it desires to change its name to Old American Mutual Casualty Company; together with a copy of the publication and affidavit thereof, in connection therewith.

We have examined the Amendment to the Articles of Association of the Reserve Mutual Casualty Company and find that the Amendment is in accordance with the provisions of the statutes of Missouri, and is not inconsistent with the Constitution and Laws of the State of Missouri and of the United States.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

CRH:CP

LINCOLN UNIVERSITY: Curators of Lincoln University may not lawfully pay the tuition for negro students at St. Louis University in Missouri under the terms of Section 10779, R. S. Mo. 1939.

September 7, 1944



Mr. Sherman D. Scruggs
President of Lincoln University
Jefferson City, Missouri

Dear President Scruggs:

This opinion is written in response to your letter of August 22, 1944, in which you state:

"Since Negro students are being admitted to the St. Louis University, at St. Louis, Missouri, a problem arises for the Curators of the Lincoln University in the matter of meeting requests for tuition costs by these students for courses which are offered at the University of Missouri and not offered at Lincoln University.

"The problem for the Curators is to decide whether or not they can legally pay tuition costs to those students, since the St. Louis University is within the State of Missouri, when the fund was provided for the payment of tuition costs for attendance at schools outside of the State.

"Will you give an opinion, please, as to what shall be the action of the Curators in these cases? Your earliest reply will aid them to meet an urgent need for information and guidance."

Your letter, therefore, submits one question for an opinion, to-wit: Whether the curators of Lincoln University may legally pay tuition costs for negro students who attend St. Louis University within the State of Missouri, under the statute authorizing them to pay such tuition costs for students attending colleges and universities in some other state who are taking a course of study equal to a course of study provided for at the State University of Missouri and which are not taught at Lincoln University.

Section 10779, Article 21, Chapter 72, R. S. Mo. 1939 is the general statute of this state on the subject of the disbursement of funds appropriated for tuitions of negro students in colleges and universities outside of the State of Missouri,

taking courses of study equal to those taught at Missouri University and not taught at Lincoln University. Said Section is as follows:

"Pending the full development of the Lincoln University, the Board of Curators shall have the authority if and when any qualified negro resident so requests, to arrange for his attendance at a college or university in some other state to take any course or to study any subjects provided for at the State University of Missouri, and which are not taught at the Lincoln University, and to pay the reasonable tuition fees for such attendance."

This section as re-enacted in 1939 by the Legislature of Missouri with some amendatory language, is practically the same section as Section 9622, R. S. Mo. 1929. It was originally enacted in 1929 (Laws, 1921, p. 386, Section 7). Since the re-enactment in 1939 of Section 10779, there has been four appropriation bills passed by the Legislature appropriating funds for tuition costs for negro college students at Universities outside the State. These enactments appear in the Session Acts of Missouri as follows, at page 70, Session Acts of 1941, page 274, Session Acts of 1941, page 51, Session Acts of 1943, and page 213, Session Acts of 1943, all carrying the same condition as to the authority of the Board of Curators of Lincoln University to disburse the funds appropriated as is contained in Section 10779, R. S. Mo. 1939, and in obedience thereto.

These four appropriation bills are respectfully as follows:

Section 2 of House Bill 17 at page 70, Laws of 1941:

"Tuition of Negro college students. There is hereby appropriated out of the State Treasury for Lincoln University, payable out of the General Revenue fund for the period beginning January 1, 1941 to June 30, 1941, the sum of Twelve Thousand Five Hundred Dollars (\$12,500.00) for the payment of reasonable tuition fees of Negro residents of the State of Missouri at the University of any adjacent State where the Board of Curators of Lincoln University shall have arranged for the attendance of such students to take any course or to study any subjects provided for at the State University of Missouri, and which are not taught at Lincoln University."

Section 2 of House Bill 582 at page 247, Laws of 1941:

"Tuition of Negro college students.--There is hereby appropriated out of the State Treasury for Lincoln University, payable out of the General Revenue fund for the years 1941 and 1942, the sum of Forty Thousand Dollars (\$40,000.00), for the payment of reasonable tuition fees of Negro residents of the State of Missouri at the University of any adjacent State where the Board of Curators of Lincoln University shall have arranged for the attendance of such students to take any course or to study any subjects provided for at the State University of Missouri, and which are not taught at Lincoln University."

Section 2 of Senate Substitute for House Bill 9, page 51, Laws of 1943:

"Tuition of Negro College students.--There is hereby appropriated out of the State Treasury for Lincoln University, payable out of the General Revenue fund for the period beginning January 1, 1943 and ending June 30, 1943, the sum of Twelve Thousand Five Hundred Dollars (\$12,500.00), for the payment of reasonable tuition fees of Negro residents of the State of Missouri at the University of any adjacent State where the Board of Curators of Lincoln University shall have arranged for the attendance of such students to take any course or to study any subjects provided for at the State University of Missouri, and which are not taught at Lincoln University."

Section 2 of House Bill 417, page 213, Laws of 1943.

"There is hereby appropriated out of the State Treasury for Lincoln University, payable out of the General Revenue fund for the years 1943 and 1944 the sum of Thirty-Five Thousand Dollars (\$35,000.00) for the payment of reasonable tuition fees of Negro resident of the State of Missouri at the University of any adjacent State where the Board of Curators of Lincoln University shall have arranged for the attendance of such students to take any course or to study any subjects provided for at the State University of Missouri, and which are not taught at Lincoln University."

These appropriations are "ear-marked" as to where and for what purpose the funds thereby appropriated shall be disbursed, and employs, as will be readily observed, precisely the same words in so doing. There is no discretion given the Curators of Lincoln University to disburse such funds in any way or for any purpose or at any place other than in accordance with the definite terms provided in such appropriations, which is that such funds shall be used "for the payment of reasonable tuition fees of Negro residents of the State of Missouri at the University of any adjacent State where the Board of Curators of Lincoln University shall have arranged for the attendance of such students to take any course or to study any subjects provided for at the State University of Missouri, and which are not taught at Lincoln University."

Under Section 22 of House Bill 657 under the title of "Money for the support of state government", page 260, l.c. 281, Laws of 1943, is an appropriation bill appropriating funds "to pay the tuition of Negro students during the biennial period 1941-1942". This is the only appropriation since the re-enactment of Section 10779, Article 20, page 72, R. S. Mo. 1939, speaking of any appropriation for tuition for negro students except the four appropriation bills hereinabove copied. Section 22 of House Bill 657, Laws of 1943, page 281 is as follows:

"There is hereby appropriated out of the State Treasury chargeable to the general revenue fund the sum of Thirteen Thousand Forty-One Dollars and Twenty-Two Cents (\$13,041.22) to pay the tuition of Negro students during the biennial period 1941-1942."

This section does not refer in anyway to Lincoln University, nor the authority of the Curators of the institution to take the funds so appropriated into their custody or to disburse it for any cause. For lack of any direction by whom the distribution of such funds shall be made, said Section 22 might well refer to the terms of Section 10250 R. S. Mo. 1939, requiring the directors of common school districts in the State of Missouri to establish and maintain schools for colored children in districts where there are eight or more colored children according to the last enumeration, or in lieu thereof to pay transportation and tuition charges for such students in any district in the county wherein a school is maintained for colored children. Certainly, there is nothing in said Section 22 to identify it as in contemplation of the provisions of Section 10779, supra, authorizing the Curators of Lincoln Univer-

sity to disburse funds for the payment of tuitions in any other states for colored students who can not get instruction in the studies being followed in this state.

Article 21, Chapter 72 of R. S. Mo. 1939, is amended in many respects to conform to the requirements of the decision of the Supreme Court of the United States in the case of State ex. rel. Gaines v. Canada et. al, 305, U. S. 337 which required definite nondiscretionary laws for an equal opportunity for the negro people of Missouri to have training up to the standard furnished at the University of Missouri

Section 10774 of said article and chapter fully complies with this requirement. Pending such development of Lincoln University to give the colored people such new schools, departments, or courses of instruction provided for in said section 10774, Section 10779 has provided for the Board of Curators of Lincoln University to arrange for the attendance at a college or university in some other state, outside the State of Missouri of qualified resident negro students of Missouri, and authorizes such curators to pay the reasonable tuition fees for such attendance by such students. Manifestly, such funds may only be obtained by appropriation from the public funds of the State by legislative appropriation. Examples of such appropriations from the general revenue of the State have been set out heretofore.

Curators, regents, and other governing officers of a state college or university are agents of the State in disbursing money of the State. Such funds are trust funds in the hands of such officials, and their position is one of fiduciary relationship with the State.

In the 11 Corpus Juris, page 994, in Sections 23 and 24 the following text law appears:

"The regents or other governing officers of a state university act as agents in behalf of the state when they enter into a contract involving the expenditure of money of the state; and their authority to bind the state is limited to the amount of the legislative appropriations granted for such purpose.* *"

"Every employee of a university is liable for the misuse of moneys received by him in his fiduciary capacity; * * * * *

Section 22 on the same page of the same work states:

"The trustees or other governing body of a college or university may make such contracts as are within the limits of the authority conferred on them by charter or statute. * * * * *

The duties and responsibilities of curators and other officers of colleges and universities in the disbursement of appropriations of public funds is thus stated in 11 Corpus Juris, pages 986 and 987, Section 11B as follows:

"Appropriations of money in aid of colleges and universities may be absolute and unconditional. If, however, a condition is attached to an appropriation, it must be strictly performed to entitle the institution to the sum offered. The disposition of the funds appropriated by congress for the aid of colleges of agriculture and mechanic arts is left to the discretion of the states, subject only to the limitation that the fund must be applied to its intended purpose. Under an act making an appropriation to such schools as shall be actually engaged in a certain kind of instruction, only such colleges may take as were in operation at the time of the appropriation. The amount of such appropriations, the time and manner of withdrawing the same, whether on voucher or otherwise, the particular purposes for which it may be used, the officer or board entitled to expend it, the priority of warrants, and the fund from which the money is to be drawn are all controlled by the terms of the statute." Citing St. ex. rel. Houck v. Gordon, 181 S. W. 32.

This was a case in which the Supreme Court of Missouri held that an appropriation must be disbursed for the particular purpose for which it was made. Louis Houck was President of the Board of Regents of the State Normal School at Cape Girardeau, Missouri. John P. Gordon was State Auditor. There had been an appropriation bill passed by the Legislature at its 1915 session, of a certain sum for salaries of the instructors at said normal school during the years 1915 and 1916, and to cover deficiencies for the years 1913 and 1914. There arose a controversy over whether the deficiencies in salaries for 1913 and 1914 should be paid out of the sum appropriated for 1915 and 1916 for salaries. Houck claimed such deficiencies should not be so paid out of that sum, but should

be paid out of other general revenues of the State. The State Auditor contended that such deficiencies should be paid out of the specific appropriation made in 1915. The President of the normal school issued his requisition for the payment of the 1913 and 1914 salary deficiencies and presented it to the State Auditor with a demand that a warrant be drawn for the amount named in the requisition. The State Auditor refused to comply. Mandamus was filed in the Supreme Court to compel compliance. The Supreme Court in holding that such deficiencies must be paid out of the specific sum appropriated therefor, and none other, Judge Woodson who delivered the opinion of the Court, l.c. 34 said:

"* * * In my opinion the two sections should be read together, and when so read and construed they clearly, to my mind, mean that any and all deficiencies that may have existed in any and all of the matters enumerated in said section 4 were to be paid out of the specific appropriations made therefor, respectively. For instance: If there existed a deficiency on the salary account, then that deficiency should be paid out of the \$175,000, appropriated for salaries; or, should the deficiency exist on account of the library, then the deficiency should be paid out of the \$3,000 appropriated for that purpose, and so on to the end of the list."

In the case of *State v. Weatherby*, 129 S. W. (2d), 887 the Supreme Court of Missouri held that public funds disbursed by one public official from a fund for which there was no specific appropriation to another public official could be recovered by the State from the person to whom the money was paid. This was a case where Weatherby, who had been an Assistant Attorney General of Missouri, was, by the consent of the then Governor in 1930, employed by the Superintendent of the Insurance Department as special counsel for that department "to enforce the insurance laws of the State". There was a contract between the then Attorney General, the Superintendent of Insurance, and the defendant Weatherby that the defendant should so act as special counsel for the Insurance Department and that he should be paid out of appropriations made by the General Assembly, and available for such purpose. The defendant assumed his duties and performed many services. He was paid out of appropriations for both the insurance department and the legal department. The controversy arose over that fact. The State claimed that Weatherby should have been paid solely out of the appropriations made by the Legislature for the Insurance Depart-

ment, and that the payments made out of the legal department were unauthorized and unlawful. This was the issue in the case. The Supreme Court in holding that the payments to the defendant out of the appropriation made for the legal department was unlawful and could be recovered by the State, on the ground that employees of the insurance department must be paid strictly out of the appropriations for that department, l.c.890, said:

"These appropriation acts evidence a clear legislative intent that the salaries, fees and expenses arising out of appointments issuing from the Insurance Department were to be chargeable against the Insurance Department fund in so far as therein provided; whereas those arising out of appointments under the Legal Department were to be paid out of the State revenues. While the General Assembly was vested with authority to change the fund chargeable with the payment of the controverted items, it did not see fit so to do. It follows that payments to one holding an appointive position under Sec. 5678, supra, as 'counsel' out of State revenue appropriated for the support of the Legal Department were without legislative sanction and unlawful. This is in conformity with the constitutional mandate found in Sec. 19 of Art. 10."

The case of Lamar Township v. City of Lamar, 261 Mo. 171 was a case where, under an assessment for road and bridge purposes in a township in a county under township organization, taxes collected within the City of Lamar were paid to the city of Lamar under the belief that the city was entitled to them. The township sued to recover this money from the City of Lamar. The Supreme Court of Missouri in holding that Lamar Township could recover such funds paid under the State of Missouri to the City of Lamar l.c. 180 said:

"II. Do these taxes levied and collected by Lamar township, from the citizens living within the corporate limits of the city, belong to the plaintiff township or defendant city? That it would seem fair for the city of Lamar to have them, all must admit. It is so recognized by our Legislature, as shown by their repeated efforts to pass and in passing such law. To whom public funds belong and the disposition that can lawfully be made of the, depends upon the law and not upon sentiment or anyone's idea of fairness. So it becomes the court's duty to be governed by the law and not by personal preference of the individual who discharges the judicial function."

Again the Court in the same case l.c. 183 said:

"The taxes collected and paid into the city treasury by the township collector and ex-officio collector were so paid because these officers understood and believed it was their duty, under the law, as was generally understood by the officers of both plaintiff and defendant, so that if the court is right as to its construction of the law, these payments were made under a mistake of law.* * * * *

This opinion l.c. 187 quoting Cyc further states:

"Although there are cases holding the contrary, the better rule seems to be that payments by a public officer by mistake of law, especially when made to another officer, may be recovered back.* * * * *

The Court l.c. 190, also on this point quoted *Morrow v. Surber*, 97 Mo. 155, as follows:

"Such a mistake as is here described furnishes ground for recovery of the money in this action. The plaintiff is the custodian of the county funds and sues here in his official capacity. He is agent of the county for the purposes defined by law, and the public is bound to take notice of the limitations of his agency. He cannot give away county funds or disburse them contrary to law. Any such disbursement is entirely invalid.* * * * *

The courts of Missouri have thus uniformly held that an appropriation of public funds must be disbursed in the precise manner designated in the act of appropriation.

CONCLUSION

Having in mind the facts as stated in the request of the President of Lincoln University, and following the law as announced by the Supreme Court of Missouri and referring also to the text writers on the question, it is the opinion of this department that the Curators of Lincoln University are not authorized by law to pay, and may not lawfully pay tuition costs for negro students attending St. Louis University in the

September 7, 1944

State of Missouri, under a Statute Section 10779, supra, which only authorizes said Curators to pay the tuition costs of negro students, resident of Missouri, who may take courses of study at a college or university in some other state equal to courses provided for at Missouri University, and which are not taught at Lincoln University. The only recourse left would be to procure relief from the Legislature permitting such Curators to use such appropriations for tuition for students in the State of Missouri who could obtain the same instruction at St. Louis University as is provided for at Missouri University but not taught at Lincoln University.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

ROY McKINTRICK
Attorney General

GWC:meb

2 p r
TAXATION: Distribution of surplus from general tax sale after payment of taxes, penalties, interest and costs.

January 6, 1944



Honorable Eldred Seneker
Prosecuting Attorney
Mt. Vernon, Missouri

Dear Mr. Seneker:

This is an acknowledgment of your letter addressed to the General, requesting an opinion relating to the Jones-Munger Law, which is as follows:

"Messrs. A, B and C were the owners of an undivided one third interest each in certain real estate situate in Lawrence County, Missouri.

"On the 7th day of November, 1941 this real estate was sold at a tax sale and Mr. D. became the purchaser at the price of \$150.00 and received a Tax Sale Certificate of Purchase for same.

"After the delinquent taxes and expenses of sale were deducted from the \$150.00 there was \$81.56 left.

"On the 9th day of March 1942 A and B Conveyed by Quit Claim Deed, all right, title and interest they had in the real estate, to D for the sum of \$25.00 each.

"Mr. D is now demanding from the County Court the interest of A and B in the \$81.56 balance.

"It appears to me that the only interest A and B had to convey to D would be the right of redemption and that D is not entitled to any interest in the \$81.56 but that A and B should receive their respective share of it."

Section 11132, R. S. Mo., 1939, is in part as follows:

"Where such sale is made, the purchaser at such sale shall immediately pay the amount of his bid to the collector, who shall pay the surplus, if any, to the person entitled thereto; or if he has doubt, or a dispute arises as to the proper person, the same shall be paid into the county treasury to be held for the use and benefit of the person entitled thereto.***"

The rights of a purchaser under a quitclaim deed are stated in the case of Starr v. Bartz, 219 Mo. 47, 59, in the following language:

It is the law of this State that a purchaser for value under a quitclaim deed acquires whatever title the grantor had at the time of the delivery of the deed. (Wilson v. Albert, 89 Mo. 537; McAnaw v. Tiffin, 143 Mo. 667.) We have also held that a purchaser for value under a quitclaim deed is under the protection of our registry act and that his title, so acquired, is good against a prior unrecorded deed of which he had no actual notice. (Fox v. Hall, 74 Mo. 315; Boogher v. Neece, 75 Mo. 383; Willingham v. Hardin, 75 Mo. 429) But that is the extent to which our law has gone in upholding the title under a quitclaim deed."

The office of a quitclaim deed is defined in 26 C.J. S., page 181, Section 8, as follows:

"A quitclaim deed is one which purports to convey, and is understood to convey, nothing more than the interest or estate in the property described of which the grantor is seized or possessed, if any, at the time, rather than the property itself.***"

Therefore, under the statement of facts in your inquiry, there being no other lien against the property sold under the general tax lien at the time of such sale,

the surplus, by virtue of Section 11132 supra, belonged to the owners at the time of its accrual. Therefore the sole question is whether the owners conveyed their interest in and to the surplus by expression or implication in a subsequent contract--the quitclaim deed.

Under the above quoted rule a quitclaim deed conveys nothing more than the interest or estate in the property described, owned at the time of such conveyance.

In the case of Bray v. Conrad, 101 Mo. 331, "the only question in the case is as to the construction of her deed, she insisting that by it she only released the land from her trust debt, and the defendant contending that by it she conveyed her dower interest as well". There the court at l. c. 336 held:

"***she releases the land from the debt to the extent of all the interest in the land that was pledged for its payment that she had power to release, is a consistent reading upon the face of the whole instrument, and this included her dower interest. To this extent only can the grant, which is broad enough in its terms to convey any and every interest she may have had in the premises, be limited by the language of the recitals. That she could have limited her release to the interest of her deceased husband, upon which she acquired a lien by her purchase of the mortgage debt is beyond question, but she did not do so. And there is nothing in the recitals, or in the situation of the parties, their relation to, or the circumstances attendant upon, the transaction which would warrant the court in excluding her dower interest from the terms of the release when she did not choose to do so, the rule being that a deed will be construed to convey whatever interest or estate the grantor may have in land at the time of its execution, unless the deed shows the grantor's

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intention was to pass a less estate or interest. 2 Devlin on Deeds, 849.

"A quitclaim deed contains operative words of conveyance. Wilson V. Albert, 89 Mo. 537. And, if by terms of her deed she has left a doubt upon its face as to what were her intentions, the difficulty is one of her own creation, and the benefit of the doubt ought to be given to the grantee.***" (Underscoring ours.)

The dower interest involved in the above decision was a dower interest in realty - not personalty - and was therefore conveyed because not reserved in the quitclaim deed. However, such deed only purporting to convey or release an interest in realty would not convey personalty, absent a description of such personalty in such instrument.

The case of Holly v. Rolwing, 230 Mo. App. 33, adjudicated a surplus, arising from a general tax sale, under a statute heretofore repealed, but similar to the above quoted statute. The court there held that such surplus belonged to the owner as against a levee district, holding a junior lien, which had been made a party to the suit. If the court had considered such tax surplus as having the status of realty - as contended by appellants - another conclusion may have been reached.

However, absent any question of a prior right or lien - such not being shown by the statement of facts in your opinion request - the tax surplus in this case was certainly personalty and, as such, became the property and was available to the owners upon accrual. No words are mentioned in such reported quitclaim deed showing an intent by grantors to divest themselves of their interest in such surplus.

Therefore, it is the opinion of this department that the co-owners, mentioned in the inquiry, are entitled to

Hon. Eldred Seneker

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their pro rata share in and to the surplus arising
from the tax sale.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

SVM:EH

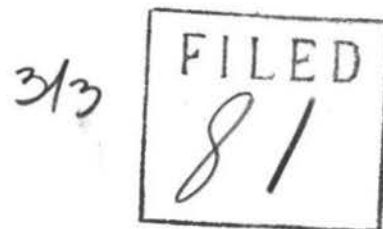
APPROVED:

ROY McKITTRICK
Attorney General

RECORDER OF DEEDS)
BILLS OF SALE)

A Recorder may refuse to record a purported Bill of Sale unless it is acknowledged in compliance with Section 3416, R. S. Mo. and if attempted to be recorded by proof, then Sections 3418, 3419 and 3420, R. S. Mo. 1939, must be complied with.

February 24, 1944



Honorable Oliver Senti
Associate City Counselor
The City of St. Louis
St. Louis, Missouri

Dear Mr. Senti:

We are in receipt of your request for an opinion under date of February 7, 1944, which reads as follows:

"An instrument, a photostatic copy of which is enclosed, was submitted to the Recorder of Deeds with a written demand that it be recorded. The instrument which imposes obligations, both on the grantee and the grantor, is not signed by the grantee and the signature of the grantor, instead of being acknowledged, is merely certified to by a notary public.

"The Recorder submitted an inquiry to this Department as to whether the law requires her to record the instrument. She was informed that after an examination of the authorities, it was our offhand opinion (1) that the law imposed no obligation upon her to record the instrument; and (2) that if she did, it would give no constructive notice to subsequent purchasers and would not subject her to any liability. As the Recorder of Deeds is a State officer we told her that she ought to act on the advice of the Attorney General.

"Will you advise this Department if the instrument is a proper one to record so that we can advise her accordingly.

"Thanking you in advance, I am,"

The instrument reads as follows:

"Bill of Sale.

"KNOW ALL MAN BY THESE PRESENTS,

"That Raymond T. Hayes of the City of Saint Louis,

February 24, 1944

State of Missouri, for and in Consideration of the Sum of Two Thousand Dollars (\$2,000.00), to be paid as hereinafter stipulated, the receipt of Five Hundred Dollars (\$500.00) of said amount is hereby acknowledged, has bargained, sold, and delivered, and by these presents does sell, bargain and deliver unto Moses V. Wiley and Hortense Wiley, all of the following goods, chattels and property, to wit:

"One (1) Mercury Cleaning Machine
One (1) Three Horse Power Boiler
One (1) Steam Iron
One (1) Sewing Machine
Three (3) Fluorescent Lights four feet long
Six (6) Light Bulbs
All Cleaning Supplies and Fluids and Materials
All Counter Supplies such as tags, brushes, etc.
All Steam Pipes, Racks, Check and Shut Off Valves
All Electric Wiring Boxes and Switches"

"To HAVE AND TO HOLD THE SAID GOODS And Chattels and Property unto the said Moses Wiley and Hortense Wiley, their heirs and assigns, administrators and executors forever.

"And the said Raymond T. Hayes does vouch himself to be the true and lawful owner of the said goods, chattels and property and that he has full power to sell and dispose of said property in the manner as aforesaid. And he does for his heirs, executors, administrators and assigns covenant and agree to and with the said Moses Wiley and Hortense Wiley to warrant and defend the said goods, chattels and property against all the lawful claims and demands of any and all persons.

"It is further agreed by and between the Said Raymond T. Hayes and Moses V. Wiley and Hortense Wiley that the delivery of said Articles, Goods, Chattels, and Property shall be made on or before February 6, 1944; that on or before that time Moses V. Wiley and Hortense Wiley agree to have paid the Sum of One Thousand Dollars (\$1,000.00); that the other One Thousand Dollars (\$1,000.00) plus Interest of \$116.00 will be paid in 24 equal Monthly Installments, evidenced by Promissory Notes and secured by a Chattel Mortgage.

"IN WITNESS WHEREOF, all of the parties have hereunto set their hands this 19th day of January, 1944.

February 24, 1944

"WITNESSES:

R. L. WitherspoonRaymond T. Hayes

Subscribed and sworn to before me this 19th day of January, 1944.

(Notary Public Seal) Robert L. Witherspoon
NOTARY PUBLIC

My Comm. Exp. 2-11-1947"

We wish to first call attention to Section 13161, R. S. Mo. 1939, which reads in part as follows:

"It shall be the duty of recorders to record: First, all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices; * * *"

It will be noted from the reading of the above quoted portion of the Section, that the law requires that before a recorder shall receive an instrument for recording that such instrument must either be proved or acknowledged according to law. With this duty in mind, we make the observation that the instrument attached to the opinion request, designated as "Bill of Sale" contains in part the following:

"IN WITNESS WHEREOF, all of the parties have hereunto set their hands this 19th day of January, 1944.

WITNESSES:

R. L. WitherspoonRaymond T. Hayes

Subscribed and sworn to before me this 19th day of January, 1944.

(Notary Public Seal) Robert L. Witherspoon
NOTARY PUBLIC

My Comm. Exp. 2-11-1947

It will be noted from the reading of the above portion that the signature of Raymond T. Hayes is witnessed by R. L. Witherspoon, and also the notation "Subscribed and sworn to before me this 19th day of January, 1944" and signed by Robert L. Witherspoon, Notary Public, whom, we presume, is the same person as the R. L. Witherspoon who witnessed the signature.

Section 3408 R. S. Mo. 1939, provides as follows:

"The proof or acknowledgment of every conveyance or instrument in writing affecting real estate in law or equity, including deeds of married women, shall be taken by some one of the following courts or officers: First, if acknowledged or proved within this state, by some court having a seal, or some judge, justice or clerk thereof, notary public, or some justice of the peace of the county in which the real estate conveyed or affected is situated; second, if acknowledged or proved without this state, and within the United States, by any notary public or by any court of the United States, or of any state or territory, having a seal, or the clerk of any such court, or any commissioner appointed by the governor of this state to take the acknowledgment of deeds; third, if acknowledged or proved without the United States, by any court of any state, kingdom or empire having a seal, or the mayor or chief officer of any city or town having an official seal, or by any minister or consular officer of the United States, or notary public having a seal."

Section 3416 R. S. Mo. 1939, provides in part as follows:

"The certificate of acknowledgment shall state the act of acknowledgment, and that the person making the same was personally known to at least one judge of the court, or to the officer granting the certificate, to be the person whose name is subscribed to the instrument as a party thereto, or was proved to be such by at least two witnesses, whose names and places of residence shall be inserted in the certificate; and the following forms of acknowledgment may be used in the case of conveyances or other written instruments affecting real estate; and any acknowledgment so taken and certified shall be sufficient to satisfy all requirements of law relating to the execution or recording of such instruments:

(Begin in all cases by a caption, specifying the state and place where the acknowledgment is taken.)

"1. In case of natural persons acting in their own right:

"On this _____ day of _____, 19 _____, before me personally appeared A B (or A B and C D), to me known to be the person (or persons) described in and who executed the foregoing instrument, and acknowledged that he (or they) executed the same as his (or their) free act and deed."

"2. * * *"

We do not quote the remaining portion of the section for the reason that it is lengthy, and we do not think applicable to the situation confronting us. It will be noted from the reading of Sections 3408 and 3416, Supra, that through the use of the words "Subscribed and sworn to before me this 19th day of January, 1944" can certainly not be said to be an acknowledgment, and does not meet the requirements of the statutes for the following reasons:

- 1) Does not contain the caption and residence thereof as is provided in Section 3416, Supra.
- 2) It does not state the act of acknowledgment.
- 3) That the person making the same, namely; Raymond T. Hayes, was personally known to the Notary Public, Robert L. Witherspoon, or that he personally appeared before the Notary Public. However, the instrument shows that it was witnessed by R. L. Witherspoon, and from this we presume that Raymond T. Hayes did personally appear, and further, it does not appear that Raymond T. Hayes was personally known to the Notary Public, and due to the fact that the statute with particularity sets out what the requirements are, and what must be stated in order to constitute an acknowledgment by a natural person acting in his own right and the absolute failure of the instrument designated as a Bill of Sale, to in anywise meet this requirement, we must conclude that the words "subscribed and sworn to before me this 19th day of January, 1944" does not constitute an acknowledgment of the instrument.

It is our thought that through the use of the words "which shall be proved or acknowledged according to law," used in Section 13161, Supra, that Sections 3408 and 3416, Supra, are controlling as to what is necessary to be contained in an acknowledgment in all instruments described in Section 13161. For the reasons stated heretofore, it is our opinion that the purported Bill of Sale is not acknowledged according to law, being not in compliance with Section 3416, Supra.

Now turning to the question of whether or not such instrument is proved within the meaning of Section 13161, Supra. At the outset we wish to call attention to Section 3486, R.S. Mo. 1939, which reads in part as follows:

"No mortgage or deed of trust of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee or cestui que trust, or unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are by law directed to be acknowledged or proved and recorded, * * *"

It is our view that in absence of a specific statute governing Bills of Sale that the words "which shall be proved or acknowledged according to law" contained in Section 13161, as well as the wording of the portion of Section 3486, Supra, places the burden upon a person who intends to rely upon proving an instrument instead of having the same acknowledged. He must resort to other sections of the statute wherein such term namely, "which shall be proved" as contained in Section 13161, Supra, is found. Therefore, resorting to the sections of the statute we call attention to Sections 3418, 3419 and 3420, where the method of making proof is set forth and such sections read as follows:

Section 3418. "No proof by a subscribing witness shall be taken, unless such witness shall be personally known to at least one judge of the court, or to the officer taking the proof, to be the person whose name is subscribed to the instrument as a witness thereto, or shall be proved to be such by at least two credible witnesses."

Section 3419. "No certificate of such proof shall be granted, unless such subscribing witness shall prove that the person whose name is subscribed thereto as a party is the person who executed the same; that such person executed the instrument, and that such witness subscribed his name as a witness thereof."

Section 3420. "The certificate of such proof shall set forth the following matters; First, the fact that such subscribing witness was personally known to at least one judge of the court, or to the officer granting the certificate, to be the person whose name is subscribed to such instrument as a witness thereto, or was proved to be such by at least two witnesses, whose names and places of residence shall be inserted in the certificate; second, the proof given by such witnesses of the execution of such instrument, and of the facts that the person whose name is subscribed to such instrument as party thereto is the person who executed the same, and that such witness subscribed his name to such instrument as a witness thereof."

We wish to point out that when we apply Sections 3418, 3419 and 3420, Supra, to the statement of a Notary Public which appears at the bottom of the Bill of Sale, we must conclude 1) that there was no intention on the part of either the Notary Public or the person who executed the Bill of Sale to resort to proving the instrument, as that term is used in Section 13161, Supra, as distinguished from acknowledging the instrument. 2) the Notary Public does not state that the subscribing witness was either himself or was personally known to him. 3) it was not witnessed by two persons as is provided by Section 3420, neither does the place of their residence appear. 4) no proof was given of the execution of the instrument as is provided in said section. 5) that the person who subscribed his name is the person who executed the same. Therefore, we must conclude that the recorder may refuse to record the purported Bill of Sale on the second ground that it is not proved within the meaning of Section 13161, Supra.

These sections, however, as well as Section 3416, are contained in Article 1, Chapter 23, R.S. Mo. 1939.

We have dispensed with the necessity of quoting cases for the reason that it is our view that the statutes have so well defined the term "acknowledged and proved" and the requirements under each definition. We therefore, conclude that because of the fact that the instrument fails to meet the requirements of the statutes that there is no duty upon the recorder to accept the instrument for the purposes of recording same. We note in your opinion request that you make observation as to the contents in the body of the instrument. In view of what we have heretofore said we do not consider it necessary that we go into the contents of the body of the instrument. By way of reference we call attention to the case of Weyrauch v. Johnson, 208 N.W. 706, 708, pars. 5, 6, wherein the court said:

"We may observe that the county recorder is largely a ministerial officer. It is a matter of common knowledge that many instruments that are technically defective are recorded, and the record of such instruments may be sufficient to impart constructive notice. There seems to be no provision in the statute which clothes the county recorder with the judicial power to determine the legal validity and effect of every instrument tendered to him for record, or the effect of such recording. He cannot arbitrarily refuse to record instruments which are in proper form and eligible to record, under our recording acts, where a reasonable request for recording is made and the fee is duly tendered.

"We find no error in the record appealed from, and it must be, and is, affirmed."

Also in the case of People v. Fromme, 54 N. Y. Supplement, 833, 834, the court said:

"* * *As has already been decided by the court of appeals of this state in regard to provisions of the previous revenue law, the congress of the United States cannot control the rules of evidence in courts of this state, nor the legality of contracts made, executed, and to be performed within its borders, except such contracts as relate to subjects over which the United States have jurisdiction. The responsibility of seeing that the proper stamp

is affixed rests upon the parties to the instrument; and the register is no more required to determine the validity under the United States revenue law of an instrument offered for record than he would be to determine whether a deed offered for record contravened some statute of the state, or was offered for the purpose of defrauding creditors, or, for any other reason, was invalid and void. To hold that such a duty rested upon the register would be to constitute him a judicial instead of a ministerial, officer. The relator having complied with the provisions of the law of this state as to the statement which he desired to have filed, and having tendered the necessary fees for such filing, it was the duty of the register to accept the same for recording."

CONCLUSION.

It is the opinion of this Department that a recorder of deeds may refuse to record a purported Bill of Sale which attempts to transfer the title and interest to personal property, unless on said instrument there appears an acknowledgment which strictly complies with Section 3416, R. S. Mo. 1939, or, if the instrument is to be proved, instead of acknowledged, then there must be a strict compliance with Sections 3418, 3419 and 3420, R. S. Mo. 1939.

Respectfully submitted,

B. Richards Creech
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney General

BRC:lr

COUNTY COURT: The Sheriff of Lawrence County not entitled to
SHERIFF: receive any of the official salary budgeted by
the County Court for compensation of a jailer
appointed by Sheriff and later discharged by him.
Sheriff's compensation not increased or diminished
during the term of office for which he was elected.

May 2, 1944

Hon. Eldred Seneker
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri

5/31
FILED
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Dear Mr. Seneker:

We acknowledge receipt of your letter dated April 25th, 1944, which, omitting caption, reads as follows:

"The County Court of Lawrence County, in preparing the 1944 budget set out \$75.00 per month to be paid for jailer.

"Sec. 9193 Revised Statutes 1939 provides for the keeping and maintaining of a jail in each county.

"Sec. 9195 Revised Statutes 1939 vests in the Sheriff the right to appoint a jailer but makes no provision for the pay of a jailer. This section also provides that the sheriff shall have the custody, rule, keeping and charge of the jail.

"Due to the fact that the business of the sheriff has fallen off he has discharged the jailer and is now acting as jailer himself.

"The Court expresses themselves as desiring to pay to the sheriff the amount so budgeted for jailer.

"In view of the fact that business in the sheriff's office has fallen off I personally feel that he should be entitled to the amount.

"I am reliably informed that several counties are now allowing the sheriff the amount budgeted for jailer.

"Please advise if the court court can pay this amount to the sheriff."

Section 9195, R. S. Mo. 1939, places upon the sheriff the duty of keeping and managing the county jail and authorizes him to appoint a jailer if he so desires. That section is as follows:

"The sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible; but no justice of the peace shall act as jailer, or keeper of any jail, during the time he shall act as such justice."

Section 9210, R. S. Mo. 1939, authorizes the appointment of a deputy jailer when it has been determined that the county jail is insufficient to secure the prisoners therein confined, and limits the maximum compensation of such deputy jailer to \$150 per year. Obviously this statute does not apply to your question.

An investigation of the statutes of Missouri discloses no provision for a salary to be paid the sheriff for acting as jailer. The services of an officer are presumed to be gratuitous unless compensation therefor is provided by statute. An officer who claims compensation for the discharge of official duties must show a statute authorizing such compensation before he can be paid. *Nodaway Co. v. Kidder*, 129 S. W. (2d) 857, 344 Mo. 795, and *Maxwell v. Andrew Co.* 146 S. W. (2d) 621, 347 Mo. 156.

In *Nodaway County v. Kidder*, supra, the following was held:

"(5) The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compen-

sation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. (State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist. 218 Mo. App. 490, 493, 279 S. W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.)

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. (State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645.)

"(6) The duties performed by appellant, and for which the additional fee or salary and mileage, was paid, were with reference to matters pertaining to and relating to his official duties as presiding judge of the county court and said services were within the scope of said official duties. The work in which appellant was engaged was directly under the supervision of the county court. Public policy requires that a public officer be denied additional compensation for performing official duties."

In holding that a sheriff was not entitled to receive an allowance from the county court for preserving the public peace our Supreme Court, in Maxwell v. Andrew County, 347 Mo. l. c. 165, used the following language:

"It may be argued that such a construction of the statutes would place an undue hardship upon law enforcement officers. That

the enforcement of the criminal law by the locally elected sheriff is a vital public concern is obvious. But if a hardship to the law enforcement officers is involved this is a matter for the consideration of the Legislature and not the courts. He who accepts public office takes it cum onere. We are constrained to hold therefore that the payments made to the sheriff in this case were illegally made. In *Nodaway County v. Kidder, supra*, we held that under similar circumstances an officer who had received compensation not specifically allowed by statute might be required to repay the same to the county in an action for money had and received. A declaratory judgment of nonliability was therefore improper."

CONCLUSION

It is, therefore, the opinion of this department that the County Court of Lawrence County, Missouri, may not allow the sheriff a salary for discharging the duties of county jailer.

Respectfully submitted,

EDGAR B. WOOLFOLK
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

EBW:CP

SCHOOL : Induction of School Director into Armed Forces
DIRECTOR : does not affect his tenure of office.

2 John
January 19, 1944 1-21



Mr. Glen Simpson
Superintendent, Sullivan County Public Schools
Milan, Missouri

Dear Mr. Simpson:

This will acknowledge the receipt of your letter of January 4, 1944, in which you request an opinion from this office. Omitting caption and signature, the full text of your letter is as follows:

"I have been asked to send the following question to you for your opinion.

"One of the schools of the county has one member of the six man board who has been inducted into the armed forces. His term expires in April, 1945. Should the board appoint some one to fill the vacancy until next school election, then elect a man to serve the remaining year, or does any vacancy exist?

"I will appreciate an early reply."

Directing our attention to those sections of our statutes involving the government, control and management of school districts, we find that at Section 10467, R. S. Mo., 1939, provision has been made for the organization of a school district. This section also outlines the procedure for the election of officers and specifically details the kind and character of records necessary for the transaction of business. Officers of the district are named and designated as directors. With respect to filling of vacancies which may occur in the board, we find a subsequent section applies.

Section 10468 R. S. Missouri, 1939, reads:

"The government and control of such town or city school district shall be vested in a board of education of six members, who shall hold their office for three years and until their successors are duly elected

and qualified, and any vacancy occurring in said board shall be filled in the same manner and with like effect as vacancies occurring in boards of other school districts are required to be filled, and the person appointed shall hold office till the next annual meeting, when a director shall be elected for the unexpired term. (R. S. 1929, Sec. 9327.)

In filling vacancies this section states "any vacancy occurring in said board shall be filled in the same manner and with like effect as vacancies occurring in boards of other school districts are required to be filled." This language directs us to another section of the statutes which is devoted exclusively to the filling of vacancies in Boards of Directors in all common schools of this state. The full text is as follows:

"If a vacancy occur in the office of director, by death, resignation, refusal to serve, repeated neglect of duty or removal from the district, the remaining directors shall, before transacting any official business, appoint some suitable person to fill such vacancy; but should they be unable to agree or should there be more than one vacancy at any one time, the county superintendent of public schools shall, upon notice of such vacancy or vacancies being filed with him in writing, immediately fill the same by appointment, and notify said person or persons in writing of such appointment; and the person or persons appointed under the provisions of this section shall comply with the requirements of section 10421, and shall serve until the next annual school meeting. (R. S. 1929, Sec. 9290.)

From our reading of the above we find that, if, and when, a vacancy occurs in the office of director,
1. By death, 2. Resignation, 3. Refusal to serve,
4. Repeated neglect. 5. Removal from the district,
the remaining directors shall appoint a suitable person to fill a vacancy.

It now becomes necessary to determine whether the induction of a director into the Armed Forces would create such a vacancy as contemplated in Sec. 10423, R. S. Mo., 1939.

Our Supreme Court has had occasion to pass on this question in two recent cases, State ex inf. McKittrick v. Wilson, 166 S. W. (2d) 499 and State ex rel. McGaughey v. Grayston, 163 S. W. (2d) 335. In the former case a circuit clerk had been inducted into the Armed Forces. The Governor appointed, after declaring a vacancy, a successor and a test suit filed in order that the Supreme Court pass on the question as to whether a vacancy had occurred in the office. This decision, which we shall quote at length, definitely states that induction into the armed services under the Selective Service Act, does not affect the title or compensation of the office.

In State ex inf. McKittrick v. Wilson, 166 S.W. (2d) 499, we find:

"* * * This is a proceeding in quo warranto instituted in this court by the attorney general as relator to determine respondent's right to hold the office of clerk of the circuit court of Henry County. The respondent was appointed to this office by the governor on April 4, 1942, and was commissioned 'to fill the vacancy in the office.' * * *

"The question for decision is whether Wall's induction into the army under the Selective Service Act resulting in his inability personally to perform the duties of his office caused him automatically to forfeit his office.

"It is our judgment that Wall did not forfeit his office by being drafted into the military service of his country. This would be equally true if he had volunteered for the duration, particularly in view of our universal military service.***

"Unless an office is abandoned or relinquished an officer is entitled to a trial on the charge of failing personally to devote his time to the performance of his duties. Such failure may be excusable. Speaking of the statutory duties to be performed by a sheriff this court has said: 'It was his duty under the law to be and remain in attendance upon the circuit court of this county when the same was in session, * * * unless by other pressing official duties, or by illness, or some other lawful reason he was prevented therefrom.' (Our

emphasis) State v. Yager, 250 Mo. 388, 157 S. W. 557, 561. Verily a public office is held on the implied condition that the officer will perform the duties belonging to it. However, Mechem in his work on Public Officers points out that generally it is a willful refusal to perform the duties of an office which works a forfeiture so that a judgment of ouster is necessary. The Statutes of some states specifically require such a judgment.

"We have held in a case similar to this where a circuit judge was called into active military service that Art. II, Sec. 18 of our Constitution, Mo. R. S. A. 'that no person elected or appointed to any office * * * shall hold such office without personally devoting his time to the performance of the duties to the same belonging,' was designed to prevent 'farming out' the performance of the duties of an office to another for the convenience or profit of the officer and did not apply to the situation we were there considering. State ex rel. McGaughey v. Grayston, Mo. Sup., 163, S. W. 2d 963. Consequently, such constitutional inhibition is not apposite here.

"Regardless of statutory provisions respondent insists that Wall legally vacated his office by going to war. This court has already said there is no technical or peculiar meaning to the word 'vacant'. It means empty, unoccupied, as applied to an office without an incumbent; an existing office without an incumbent is vacant. An incumbent of an office is one who is legally authorized to discharge the duties of that office. State ex rel. Sanders v. Blakemore, 104 Mo. 340, 15 S. W. 960. In the last war the county attorney of Saline County, Texas was drafted. It was claimed his office thereby became vacant. The court held otherwise. Hamilton v. King, Tex. Civ. App., 206 S. W. 953.

"We come to the conclusion that there is nothing in the law, constitutional, statutory or common, which requires us to hold that Wall has forfeited his office by becoming a soldier in the army. Therefore, the office was not vacant and the

appointment of respondent was unauthorized. * * *

In State v. Grayston, 163 S. W. (2d) 335, Judge Douglas has this to say:

"* * * The decision in this case turns on whether a judge of a circuit court who is called into the military service of the United States as a Colonel in the National guard thereby vacates his judicial position."

"The constitutional provision requiring personal performance was intended for another purpose. It was designed to prevent 'farming out' the performance of the duties of an office to another for the convenience or profit of the Officer. Temporary performance of the duties of a special judge are governed by law, not by the wishes of the regular judge."

"The situation we are considering is analogous to a leave of absence as that term is understood in the business world. The common meaning of the term signifies temporary absence from duty with an intention to return, during which time remuneration is suspended. We note with approval that Judge Watson has not drawn or received any salary as circuit judge since December, 1940. The fact that Judge Watson is unable personally to perform his judicial duties while in military service does not make his holding both offices incompatible under the circumstances. If the law did not permit a substitute to carry on the duties of the office in his absence a different question might be presented. We need neither discuss nor decide that. ***"

"All citizens should be encouraged, however possible to aid their country. This is the National policy. Congress has said that National Guardsmen, entering from Federal employment will be restored to their civilian positions and asks private employ-

ers to make the same assurance where possible. This is all out war where 'every single man, woman and child is a partner in the most tremendous undertaking of our American history.' More man power is needed than ever before. Women are filling the depleted ranks in defense industries. No man should be hindered in helping his country.

"Whether filling a civil governmental office renders service as necessary as military service is not a question for the courts.

"The situation involved in this case presents practical considerations which may call for action by our Legislature or by the people in amending the Constitution. The court can but take the law as it finds it. And until either the Legislature or the people do adopt some new provision applicable to such situation, all the court can say is: Let no citizen be penalized because he is a patriot. Let us keep faith with those who fight for us. The motto on our great seal of State proclaims this. 'Let the Safety of the People be the Supreme Law.'

"Our writ in prohibition shall not issue."

CONCLUSION.

From our reading of the above it is the opinion of this department that the induction into the Armed Forces of a School Director does not affect his tenure of office. His office does not become "vacant" within the provisions of the statute and under the opinion as written in State v. Grayston, 163 S. W. (2d) 1. c. 341.

Mr. Glen Simpson

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1-19-44

The situation we are considering is analogous to a leave of absence as that term is understood in the business world.

Respectfully submitted

L. I. MORRIS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LIM:LeC

SCHOOLS:

: Sending district where pupil resides must
: pay non-resident tuition under section
: 10458, R. S. Missouri, 1939. "Residence"
: is determined by facts in each particular
: case.

March 7, 1944

FILED

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Mr. Lee Simkins, Superintendent
Braymer Public Schools
Braymer, Missouri

Dear Mr. Simkins:

This will acknowledge the receipt of your letter of February 15, 1944, wherein you request an opinion of this office. Omitting caption and signature, the text of your letter is as follows:

"We have a pupil attending our high school who is staying in a home of a non-relative living in a school district in Carroll county. The family of this pupil resides in a school district in Ray county.

"Because the parents of the pupil do not maintain a home in the Carroll county district, that district feels no obligation to pay the \$30.00 tuition fee assessed against the sending district for non-resident pupils attending the Braymer public high school.

"We contacted the clerk of the Ray county district in which the parents of the pupil reside. She maintains, that although the parents of the pupil live in the Ray county district, the pupil does not live there, and, therefore, the district is not obligated to pay the tuition fee we assess sending districts.

"Since our per pupil costs are exceedingly high this year, we are anxious to collect all fees due the district. Our purpose in writing you is to obtain your opinion as to the district legally obligated in the case given above."

Your letter does not contain enough facts for a complete and definite answer to your question.

The circumstances and facts relating to the stay of the pupil in Carroll County are the factors which determine the matter. However, we are undertaking to outline the rules by which you can make the determination when you have all the facts in your possession.

Section 10458, R. S. Missouri, 1939, reads in part as follows:

"The board of directors of each and every school district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county, or an approved high school maintained in connection with one of the state institutions of higher learning, where work of one or more higher grades is offered;
* * * *"

It will be observed that the only tuition for which a district is liable is the tuition of a pupil who is a resident of that district. The determination of "residence" within the school district presents difficulties and may be said to be largely determined by the facts in each case.

In *Barnard School District v. Matherly*, 84 Mo. App. 141, it is stated, "In our opinion to entitle one to school privileges for his children in the public schools, he must bona fide reside within the school district. Coming temporarily within the district to reside during the scholastic year, for the purpose of sending a child to the school of that district can not be allowed.

It may be stated as a general rule that ordinarily the domicile of the parents is the domicile of the minor children.

Lacy v. Williams, 27 Mo. 280
Lewis v. Castello, 17 Mo. App. 593.

However, the courts have held that domicile and residence are not always synonymous, and that a person may have a legal domicile in one place and a temporary residence in another. The fact that the parent was not residing with the child would not necessarily prevent the child from being a resident of another school district within the meaning of the statute. It would depend on the particular facts and circumstances surrounding that residence. The general rule being that if a pupil were in a school district for the bona fide purpose of remaining there indefinitely and not for the mere purpose of obtaining the benefits which may be his by reason of being in that district, such child would be a "resident" of such district within the meaning of the school law. Whether such child is in the district under circumstances as would entitle him to be classed as a resident of that district for school purposes will have to be determined from the facts surrounding that particular child.

School District v. Matherly, supra
State ex rel. v. Clymer, 164 Mo. App. 671.

In State v. Clymer, the child was living with his grandfather and the court held him to be a "resident" within the meaning of the law even though the parents did not reside there. In Binde v. Klinge, 30 Mo. App. 285, it was held that if a child had gone to live with its grandmother without any expectation of returning to its parental residence while the grandmother lived and not merely for the purpose of acquiring the privilege of a better school than existed at the domicile of the parents she might be a resident of the grandmother's school district, although the father resided elsewhere.

In McNish v. State ex rel. 104 N. W. 186, a cousin of the child's mother took the child to live with her in Nebraska when the mother died. The father lived in Iowa. The court held that the cousin stood in loco parentis and the child was entitled to free tuition under the Nebraska law.

Mr. Lee Simkins

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Mar. 7, 1944

CONCLUSION.

It is therefore the conclusion of this office that the liability of a school district to pay non-resident tuition under section 10458 R. S. Missouri, 1939, depends on whether the pupil is a resident of that district. "Residence" is determined by the particular facts surrounding each child with the general rule that if a pupil is in a school district for the bona fide purpose of remaining there indefinitely, and not for the mere purpose of obtaining the school benefits.

Respectfully submitted

ROBERT J. FLANAGAN
Assistant Attorney General

APPROVED:

ROY McKITTERICK
Attorney General

RJF:LeC

COUNTY
COURTS:

County Courts may purchase real estate improved or unimproved as an addition and enlargement of court house facilities; payment subject to the county budget law and section 13118. R. S. Missouri, 1939.

March 10, 1944



Honorable James S. Simrall, Jr.,
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Mr. Simrall:

We are in receipt of your letter of March 2, 1944, in which you request an opinion of this office, which letter reads as follows:

"The County Court of Clay County, Missouri, is contemplating the purchase of a building formerly occupied by the Citizens Bank of Clay County, Missouri, which is now closed.

"At the present time the County Court is paying rental on offices for the Rationing board, Social Security office, Agricultural Adjustment office, Farm Security office and Public Administrator's office, for the reason that there is not sufficient office space in the Court House for these offices.

"They felt that if they could legally purchase the bank building, as an addition to our enlargement of the Court House facilities, that it would be a wise move for them to take. The County Court is extremely anxious to secure an opinion as to the legality of such a purchase as soon as possible, because, it is the only building available, and there are other investors that are interested in purchasing same.

"If the Court can legally purchase this building, which would probably cost in the neighborhood of \$15,000 to \$20,000, they would pay for it out of the fund in Class Six (6), which they have on hand,

but for which are not budgeted for this particular purchase, because at the time the budget was prepared, they did not anticipate or contemplate such purchase. In this connection, Section 13717 of the Revised Statutes of Missouri for 1939 is as follows:

'The County Court of any county in this state shall have power to acquire by purchase, for such county, improved or unimproved real estate for a site for a Court House, jail or poor house or infirmary, or, when the County owns such site or sites, to acquire by purchase, improved or unimproved real estate, if an addition to, or enlargement of the same.'

"Said section also provides that property for such purchase may be condemned by the county, if they can not agree as to a purchase price.

"I would greatly appreciate an opinion from your department, concerning the legality of the above proposition as soon as such can be conveniently sent to me.

"Thanking you for your trouble and cooperation in this connection, I remain, "

Section 13717 R. S. Missouri, 1939, provides:

"The county court of any county in this state shall have power to acquire by purchase, for such county, improved or unimproved real estate for a site for a court house, jail or poorhouse or infirmary; or, when the county owns such site or sites, to acquire by purchase improved or unimproved real estate as an addition to or enlargement of the same; and if the county court and the owner or owners of the real estate sought to be purchased for any of said purposes cannot agree upon the compensation to be paid therefor, or if for any other reason, the title thereto cannot be acquired by contract, the county court of such county may proceed, in the name and on behalf of said county, to appropriate and condemn such real estate in the manner provided by article 2 of chapter 8, R. S. 1939, and the same proceedings shall be taken as provided in said article for the condemnation of lands for other public uses, as far as the same may be applicable. "

Clearly under this section the county may purchase property "as an addition or enlargement" of the courthouse. Your contemplated purchase for office space of various county offices clearly comes within the provisions of this section.

Section 13781, R. S. Missouri, 1939, provides:

"The county court of any such county may pay for the real estate acquired under the provisions of section 13717 out of any money in the county treasury belonging to the contingent fund or out of any surplus in any other fund at the close of any fiscal year, after the payment of all warrants drawn during such year against such fund and of all other previously issued and outstanding warrants against the same. "

Section 10914, R. S. Missouri, 1939:

"* * * Amount available for all other expenses after all prior classes have been provided for. No expense may be incurred in this class until all the prior classes have been provided for. No warrant may be issued for any expense in class 6 unless there is an actual cash balance in the county treasury to pay all prior classes for the entire current year and also any warrant issued on class six. No expense shall be allowed under class six if any warrant drawn will go to protest: Provided, however, if necessary to pay claims arising in prior classes warrants may be drawn on anticipated funds in class six and such warrants to pay prior class claims shall be treated as part of such prior funds. Nor may any warrant be drawn or any obligation be incurred in class six until all outstanding lawful warrants for prior years shall have been paid. The court shall show on the budget estimate the purpose for which any funds anticipated as available in this class shall be used."

An allocation of the purchase price in class six and the payment in accordance with the terms of section 10914 would not violate section 13718 heretofore quoted.

Hon. James S. Simrall, Jr.

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Mar. 10, 1944

CONCLUSION.

It is therefore, the opinion of this office that a county court has the right to purchase real estate, improved or unimproved, as an addition or enlargement of its courthouse facilities; payment for said property being subject to the provisions of section 13718 R. S. Missouri, 1939, and the county budget law.

Respectfully submitted

ROBERT J. FLANAGAN
Assistant Attorney General

RJF:LeC

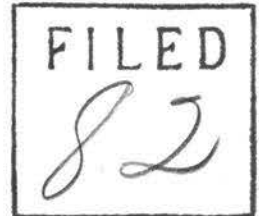
APPROVED:

ROY McKITTRICK
Attorney General

SCHOOLS: : Under Section 10410 R. S. Mo., 1939, Board
: of Arbitration passing on change of boundaries
: between two districts NOT authorized to
: allow change of one district is left with
: less than twenty persons of school age,
: or if territory to be added to other district
: does not contain persons of school age.

April 15, 1944

Mr. Glen Simpson, Superintendent
Sullivan County Public Schools
Milan, Missouri



Dear Mr. Simpson:

This will acknowledge your letter of April 8,
in which you request an opinion, as follows:

"At the recent school election, an attempt to change the boundary between two schools was made, in accordance with the provisions of Sec. 10,410. One school voted in favor of the change and the other voted against such change. Now an appeal has been filed with me, and I have appointed a board of arbitration, as provided in Sec. 10410.

"I notice the following provision in that section:

"No new district shall be formed, or boundary line changed by which any district shall be formed containing within its limits by actual count less than twenty persons of school age, or by which any district shall be left containing by actual count less than twenty persons of school age.

"Here is my problem: One of the districts affected (the one in which the farm is now located), has less than twenty persons of school age at the present time. If the farm is changed into the other district, it will make no difference in the number of persons of school age either way, because there are no persons of school age residing in the home.

"Would the above provision prohibit any right of appeal in this case, or if the case is brought before the board of arbitration,

Mr. Glen Simpson

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Apr. 15, 1944

would the board be compelled to leave the boundary as it is now, because of the fact that there are not twenty persons of school age living in the district at the present time.

"I have set April 18 as the date for the board to consider the case, so will you please inform me before that date if you possibly can do so."

Your letter involves a construction of the following parts of Sec. 10410 R. S. Mo. 1939.

"Provided however, that no new district shall be created or boundary line changed by which any district shall be formed containing within its limits by actual count less than twenty persons of school age or by which any district shall be left containing within its limits by actual count less than twenty persons of school age:

"* * * It is further provided that in changing the boundary line between the two established districts, one district shall not encroach on the other simply for the acquisition of territory."

You will note that the statute clearly provides that no district shall be left with less than twenty persons. This clause is not a mere repetition of the prior clause stating that no district shall be formed containing less than twenty persons of school age. It adds something to this statement and could only apply to the situation you have here where the district already had less than twenty persons of school age. It is submitted that there is a good reason for this rule, for if you were allowed to constantly decrease the boundaries of your districts now containing less than twenty persons of school age it would be very unlikely that that district would ever attain twenty persons.

It is also difficult to see how your situation can escape the other prohibition of the statute, that is, that no district shall be formed solely for the

Mr. Glen Simpson

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Apr. 15, 1944

purpose of obtaining territory. You state that no person of school age is going to be added by the locating of this farm you speak of, in the other district. The purpose therefore couldn't be to add new pupils to the new district.

In School District No. 14 vs. School District No. 27, 195 Mo. App. 504, it is stated:

"If there were no school children on these transferred lands, no other reason being assigned, it is manifest that the change was merely to acquire more territory."

CONCLUSION.

It is therefore, the conclusion of this office, that under Sec. 1041C, R. S. Mo., 1939, the Board of Arbitration would have no right to make a change in boundaries of two districts where one district would be left with less than twenty persons of school age, even if the district prior to the suggested change had less than twenty persons of school age. Said Board also could not authorize a change where lands not containing persons of school age would be transferred to another district.

Respectfully submitted,

ROBERT J. FLANAGAN
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

RJF:
LeC

PURCHASING:
AGENT:

Cannot prescribe manner or payment of rental accounts; nor is certification required under Sec. 14592, Laws 1943, p. 1005, on rental accounts.

January 11, 1944.



Hon. Forrest Smith
State Auditor,
Jefferson City, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of December 3, 1943, presenting for our opinion the following questions:

(1) Does the State Purchasing agent have the right to require rental claims, on leases negotiated by him for the Unemployment Compensation Commission, to be approved by the Purchasing Agent before the claim may be paid by the Auditor?

(2) Is it necessary under Section 14592, Laws 1943, p. 1005, that the Unemployment Compensation Commission furnish to the purchasing agent a certificate that an unencumbered balance remains in its appropriation and allotment to pay rentals, in submitting its rental statements for payment?

Section 14590, R. S. Mo. 1939, provides:

"The purchasing agent shall purchase all supplies except printing, binding and paper * * * for all departments of the state, except as in this chapter otherwise provided. He shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the State." (Underscoring ours).

Section 14591, R. S. Mo. 1939, provides in part:

"The purchasing agent shall make rules * * * governing the manner in which all claims for supplies delivered shall be submitted, examined, approved and paid."

Under these provisions it appears that the purchasing agent is to purchase all supplies, negotiate all leases and make rules governing how claims for supplies delivered shall be submitted, approved and paid. The first question seems to turn upon whether rental claims for quarters used is "supplies delivered" within the meaning of Section 14591. In resolving this question we first note that Section 14590 uses both the terms "purchase all supplies" and "negotiate all leases" and it would therefore seem that the word "supplies" as there used does not include "leases". To consider it otherwise is to impute to the General Assembly the use of superfluous language, for if the word "supplies" includes "leases" the use of the word "leases" was unnecessary. However, we are not left without a definition of "supplies". Section 14599 provides:

"The term 'supplies' used in this chapter shall be deemed to mean supplies, materials, equipment, contractual services and any and all articles or things * * *. Contractual services shall include all telephone, telegraph, postal, electric light and power service, and water, towel and soap service.* *".

We cannot find any definition of these terms which would permit us to construe rent of quarters as included. The only possible application would be the term "contractual services" but we find nothing to indicate that "services" means "quarters rented." The statutory definition of "supplies" not including rentals, and in view of the distinction made in Section 14590 between "supplies" and "leases", we are of the opinion that the rule making power vested in the purchasing agent does not authorize him to prescribe the manner in which rental statements shall be submitted, examined, approved and paid.

This conclusion also covers your second question. Section 14592, Laws 1943, p. 1005, provides:

"The purchasing agent shall not furnish any supplies to any department without first securing a certification for an official of the department, * * * that an unencumbered balance remains in the appropriation and in the allotment to which the same is to be charged, suffi-

Hon. Forrest Smith,

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1-11-44.

cient to pay therefor."

Supplies not including rent of quarters, then this section has no application to require such certification in connection with leasing of quarters.

CONCLUSION.

Therefore, it is our opinion that the purchasing agent does not have authority to prescribe the manner in which a department's statements of rental accounts on quarters rented shall be submitted, examined, approved and paid; nor does a department have to submit a certification as to a sufficient appropriation and allotment to the purchasing agent in connection with those payments. In order that we are not misunderstood, we wish to say that this opinion does not deal with any requirement in respect to the negotiation of leases.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LLB/LD

- RECORDER OF DEEDS 1) When a paper writing purporting to be a last will & testament may be refused for recording.
- 2) Four questions dealing with the releasing and cancelling of notes and releasing of deed of trust securing same of record in the recorder's office.
- 3) a) Three day waiting period for issuing marriage license may be dispensed with on order of circuit or probate court or judge thereof in vacation giving authority to recorder.
- 3) b) Applicant who is pregnant, may dispense with certificate of serological test for syphilis by presenting certificate of licensed physician so stating, to the recorder.
- February 8, 1944

Honorable Roy G. Skillman
Circuit Clerk and Recorder
Fayette, Missouri



Dear Mr. Skillman:

We are in receipt of your request for an opinion from this Department, which opinion request reads as follows:

"Of course, as we understand Instruments dealing with the transfer of real estate, must be proved or acknowledged before they can be recorded. Now we have a Will that is several years old, it has not been proved by its regular course through probate Court and same is now offered for recording. Is the fact that this Will has been witnessed enough proof to enable us to record it? Please advise, also:

"We are confused and are in need of a definite course to pursue, in regards to releasing notes, thus we are asking your opinion.

"1st. Not marked paid on face of note and on the back we find this, For release of record only, without recourse, and no endorsement.

"2nd. Not marked paid on face of note and on the back we find this, For release of record, without recourse, and an endorsement. For an endorsement, I mean a signature of Martgagees name.

"3rd. Now we have had this, the holder presents note with no markings whatsoever, no paid, nor endorsement and still insists that same be released, in particular a beneficiary has been insistent on this procedure.

"4th. Then we have had this matter, Note is not marked paid on face of same, but does bear an endorsement on the back. Thus can holder demand

a release of record?

"Also, may we digress a bit; suppose we are issuing a marriage license because the Lady is Pregnant are they subject to the three day waiting period.

"Thanking you again for your many kind favors, we are."

We call attention to Section 549, R. S. Mo. 1939, which reads as follows:

"In all cases where lands are devised by last will, a copy of such will shall be recorded in the recorder's office in the county where the land is situated, and if the lands are situated in different counties, then a copy of such will shall be recorded in the recorder's office in each county within six months after probate."

It will be noted from the reading of the last section, supra, that it is provided that in all cases where lands are devised by last will, a copy of such will shall be recorded in the recorder's office, etc. On review of the preceding section contained in Article 20, Chapter 1, R. S. Mo. 1939, our attention is called to Section 546, R. S. Mo. 1939, which reads as follows:

"All wills shall be recorded by the clerk of the probate court, in a book kept for that purpose, within thirty days after probate, and the originals shall be carefully filed in his office."

It will be noted from the last section, supra, that all wills must be recorded in the book kept for that purpose within thirty days after probate, in the office of the probate court. Under the rules of statutory construction it is our duty to read sections 546, and 549, R. S. Mo. 1939, in pari materia. For it is said in the case of State ex inf. V. Koeln, 102 S.W. 748; 270 Mo. 174, l.c. 191:

"* * * It is a well established rule of statutory construction that statutes in pari materia, even though enacted at different dates, are to be construed together and if possible given such construction as will harmonize and give effect to all the provisions."

February 8, 1944

Therefore, it is our view that through the use of the word "copy" in Section 549, R. S. Mo. 1939, it is meant that a certified copy of the will that was recorded under Section 546, R. S. Mo. 1939, is intended.

We further wish to call attention to Section 553, R. S. Mo. 1939, which reads as follows:

"Any will admitted to probate in any state, territory or district of the United States, together with the order admitting the same to probate therein, certified according to act of congress, shall be admitted to probate in this state in any county where real estate is affected thereby, or filed in the office of the recorder of deeds in such county, and all such wills so certified, heretofore admitted to probate in any such county, or filed for record in any such recorder's office, shall give notice thereof, and they, or certified copies thereof, shall be admitted as evidence in all courts in this state, and when any will is admitted to probate in this state, as aforesaid, a certified copy thereof, under official seal, made by the judge or clerk of such court, or the recorder of deeds, in case the same is filed in the recorder's office, of the record of any such will, and order admitting it to probate, may be filed in any other county in this state where real estate is thereby affected, with like effect as if originally filed therein."

It will be noted that the last section, supra, provides any will admitted to probate in any state, territory or district of the United States, together with the order admitting the same to probate therein, certified to according to the act of congress, shall be admitted to probate in this state in any county where real estate is affected thereby, or filed in the office of the recorder of deeds in such county. It will be noted by this language that it is clearly meant that the paper writing offered for record in the recorder's office must show by proper certification that such paper writing has been probated, and fully proved up as the last will and testament of the purported testator in the jurisdiction from whence it came. In other words, the last section is clear that a purported will which does not bear the proper certificate should not be recorded when the same came from a foreign jurisdiction. Therefore, it is our opinion that when we read Sections 546, 549 and 553, R. S. Mo. 1939, together, we must conclude that a recorder of deeds should not receive and record any paper writing

proporting to be a last will and testament, whether such paper writing devises real estate or not, unless such paper writing bears a certificate showing that such paper writing has been admitted to probate, and that said paper writing is a certified copy of the last will and testament of the therein named testator or testatrix, and that such paper writing is recorded in the record provided for such purpose in the office of the probate court.

Now turning to the last portion of your opinion request.

In your first question you give the following statement of fact:

"1st. Not marked paid on face of note and on the back we find this, For release of record only, without recourse, and no endorsement."

In answer to this question we call attention to Section 3465 R. S. Mo. 1939. Because of the length of the section we only copy a portion of it:

"If any mortgagee, cestui que trust or assignee, or administrator of the mortgagee, cestui que trust or assignee, receive full satisfaction of any mortgage or deed of trust, he shall, at the request and cost of the person making the same, acknowledge satisfaction of the mortgage or deed of trust on the margin of the record thereof, * * * *. In case satisfaction be acknowledged by the payee or assignee, or in case a full deed of release is offered for record, the note or notes secured shall be produced and canceled in the presence of the recorder, who shall enter that fact on the margin of the record and attest the same with his official signature; * * *"

It will be noted from the reading of the portion of the aforementioned section that when the holder of a note shall at the request and the cost of the person making the same, acknowledge satisfaction of the mortgage securing said note or notes, and it is further provided that in case it is acknowledged by the payee or assignee the note or notes shall be produced and canceled in the presence of the recorder. We understand by your first question that the holder of the note, whom we presume is the payee or assignee of said note, in due course has failed to place

February 8, 1944

his signature under the statement which appears on the back of the note. Therefore, unless he appeared personally, it is our view that you would not have authority to allow this release of the deed of trust securing said note or to cancel the note, for the reason the holder of the note does not designate or give authority by way of assignment to any person to sign the deed of trust marginal release in your office or to sign the cancellation of the note which is placed upon the note by the recorder. It is our view that this note should be sent back to the person who sent it, stating to him that he should appear in person with the note and fulfill the requirements of the statutes by signing the marginal record and notification on the note. Then the note should be delivered by him to the maker thereof. The maker thereof should defray the cost of release. If some other person is to appear in his stead then the holder of the note should place an endorsement which is in substance as follows:

"I assign the within note to _____
(name of person

to appear at your office with the note)
for the purpose of cancelling this note and
satisfaction of deed of trust securing same
in the Recorder's office, _____
County."

(Signature of holder of note.)

The words "without recourse" are not necessary for the reason by the foregoing statement he would make a limited endorsement and such words be merely precautionary words. Of course the words in a regular endorsement are necessary if the holder or assignor desires to protect himself from future liability on the note in the hands of subsequent assignees. If he made the endorsement to some person then when such person appeared in your office, the above endorsement on the back of the note would be your authority to allow such person to sign the marginal release on the deed of trust record, providing the deed of trust only secured this one note and cancel the referred to note. In other words, you would follow your regular procedure. If the holder of the note appeared in person of course he could do this without any endorsement on the back of the note, if the note showed on the face that he was the payee or if there was an assignment on the back of the note from the preceding payee or assignee showing that he was the holder thereof in due course.

February 8, 1944

In your second question, you give the following statement of fact:

"Not marked paid on face of note and on the back we find this, For release of record, without recourse, and an endorsement, For an endorsement, I mean a signature of Mortgagees name."

It is our view that this note should be returned to the mortgagee who placed the assignment on the back of the note directing that he designate a person's name in the endorsement or that a new endorsement be made to read in substance as follows:

"I assign the within note to _____
(name of person

whom you designate shall have the authority to produce the note to your office and sign the record) for the purpose of cancelling this note and satisfaction of deed of trust securing same in the Recorder's office, _____
County."

(Signature of holder of note)

In other words, it will be noted by your statement in question two, that the mortgagee or payee of said note though he signed the statement placed on the back thereof, he does not designate who shall have the authority of releasing the note and the security of the note. For that reason you would not know who held the valid assignment of the note for that particular purpose; in truth and fact the wording does not constitute a valid assignment of such note for any purpose as stated in your second question.

Question Number Three reads as follows:

"Now we have had this, the holder presents note with no markings whatsoever, no paid, nor endorsement and still insists that same be released, in particular a beneficiary has been insistent on this procedure."

If we are to understand by this question that the named payee in the note presents the note himself to your office then in that event there need not be any notification on the face of the note that it has been paid nor need there be any statement on the back of the note in the way of an endorsement. For such person would have the authority to sign the marginal satisfaction of the deed of trust securing the note and would also have the authority to sign under the notification that you

February 8, 1944

place on the note, that the same was produced and cancelled in your presence. On the other hand if we are to understand that the person who produces the note and claims to be the legal holder thereof, but that such note does not show that the payee therein had made an assignment on the back thereof that the note has been assigned to him for a valuable consideration, then you should refuse to satisfy the record until the proper authorization is made by the payee for you would have no way of knowing with certainty that such person was the holder of said note in due course for value.

Question Number Four reads as follows:

"Then we have had this matter, Note is not marked paid on face of same, but does bear an endorsement on the back. Thus can holder demand a release of record?"

We assume by your question Number Four that a substantial statement appears on the back of the note placing the ownership of said note in the holder thereof who appears in person in your office, but that such note does not have marked across the face "paid" or "paid in full". It is our view that these words are not necessary on the face of any note for from the reading of a portion of section 3465 heretofore set forth, that the law requires that the legal holder of the note if the same be paid, shall at the request of the maker thereof, appear and satisfy the deed of trust and cause said note to be cancelled by you in your office. The whole question that presents itself to you in every case is whether or not the person who presents the note is the holder of the note in due course or the note has been assigned to him for a limited purpose, namely; to satisfy the deed of trust record and cancel the note in your office. Of course there are situations where notes are produced and the security is partially released and the note is shown to have been produced and not cancelled. We do not go into this question for the reason that you do not ask any question of this nature. Further, we do not cover situations where notes have been lost or destroyed. A reading of Section 3465, supra, will afford that information.

Now turning to your final question which reads as follows:

"Also, may we digress a bit; suppose we are issuing a marriage license because the Lady is Pregnant are they subject to the three day waiting period."

Section 3364, Laws of Missouri, 1943, page 640, reads in part as follows:

"* * *Before applicants for a marriage license shall receive a license, and before the Recorder of Deeds shall be authorized to issue a license, the parties to the marriage must, at least three days before the date they desire such license to be issued, present an application for the license to the Recorder of Deeds. * * *Provided, however, that said license may be issued on order of the Circuit or probate court or a judge thereof in vacation of the County in which said license is applied for, without waiting three days as herein provided, such license being issued only for good cause shown and by reason of such unusual conditions as to make such marriage advisable."

It will be noted from the reading of the aforementioned portion of Section 3364, that at least three days before the date they desire such license to be issued, they must present an application for the license to the Recorder of Deeds. Provided, however, that said license may be issued on order of the circuit or probate court or judge thereof of the county in which said license is applied for. We call attention to the fact that at no other place in the law is authority given to any other person to make orders which have the effect of dispensing with a three day waiting period. Therefore, we must conclude that a person who falls under the situation set forth in your question must wait the three day period unless such person procures an order from the circuit or probate court or judge there in vacation of the county in which said license is applied for. Or in other words, a recorder of deeds can only dispense or accelerate the time after an application has been presented to his office for a license to a lesser time of issuing the license than three days where he has in his hands an order of a circuit or probate court or judge thereof in vacation ordering that such license shall be immediately issued or at the time indicated in the order. In connection with your question we further wish to call attention to Section 3364a, which reads in part as follows:

"It shall be unlawful for the Recorder of Deeds of any County or City to issue a marriage license, to any person, unless such person presents and files with such Recorder of Deeds a report of a negative laboratory serological test for syphilis and an affidavit signed by the applicant that to his or her best knowledge and belief he or she is free from syphilis; * * * or unless a duly licensed

February 8, 1944

physician presents a certificate stating that one of the applicants for a license to marry is on his or her deathbed and unlikely to consummate the marriage or that an applicant is pregnant."

It is our opinion from the reading of the portion set forth of section 3364a that the person referred to in your question can dispense with the requirement of said section of a certificate of a serological test for syphilis if she presents a certificate of a duly licensed physician that she is pregnant.

CONCLUSION.

- 1) It is the opinion of this department that a recorder of deeds may refuse to record a paper writing purporting to be a last will and testament, unless such paper writing authentically shows that it is a certified copy of a will, duly recorded in the book kept for that purpose in the probate court's office of a Missouri county, or such paper writing has been admitted to probate in some other state, territory, or district of the United States with the order admitting the same to probate therein, and bears an authentic certificate.
- 2) It is the opinion of this department that a note on which the following notation is found: "Not marked paid on face of note and on the back we find this, For release of record only, without recourse, and no endorsement.", can only be cancelled and the security securing same satisfied of record by the named payee of the note or one who is shown to be an assignee through proper endorsement on the back of the said note as the notation above set forth is a nullity.
- 3) It is our opinion that a note on which the following notation is found: "Not marked paid on face of note and on the back we find this, For release of record, without recourse, and an endorsement. For an endorsement, I mean a signature of Mortgagees name." can only be cancelled and the security securing same satisfied of record by the original payee of said note or his assignee through proper endorsement on said note appearing in person at the recorder's office. The above referred to notation on the note does not authorize any named person for the limited purpose stated in said purported endorsement as the assignee, and for that reason said purported endorsement is a nullity.

February 8, 1944

4) It is the opinion of this department that a note on which the following notation is found: "Now we have had this, the holder presents note with no markings whatsoever, no paid, nor endorsement and still insists that same be released, in particular a beneficiary has been insistent on this procedure." can only be cancelled and the security securing same satisfied of record by the named payee on the face of the note appearing at the office, in person, with the original note or a copy of the same as is provided for in Section 3465 R. S. Mo. 1939.

5) It is the opinion of this department that a note on which the following notation is found: "Then we have had this matter, Note is not marked paid on face of same, but does bear an endorsement on the back. Thus can holder demand a release of record?" can only be cancelled and the security securing same satisfied of record by the holder of said note in due course (assuming that the endorsement on the back of the note is sufficient to place the title of said note in said person) then such person may appear in your office, present the note, and have the same cancelled of record, and the security duly satisfied on the margin of the record. It is further our opinion that whether or not a note is marked "paid" or "paid in full" across the face of the note is not controlling. But the question to determine is whether or not the person presenting the same is a holder thereof in due course, or is the holder of said note for a limited purpose, with power to do a limited thing. For example, for the purpose of cancelling the note and satisfying deed of trust securing same of record in the recorder's office in which said note is presented.

6A) It is the opinion of this department that the three day waiting period for the issuance of a marriage license after the application is filed therefor, can only be dispensed with through the procurement of an order from a circuit or probate court or judge thereof in vacation of the county in which said license is applied for, giving such authority to the recorder of deeds of said county.

6B) If an applicant is pregnant she may dispense with the requirement of a certificate of a serological test for syphilis by presenting to the recorder of deeds a certificate from a duly licensed physician stating that she is pregnant.

Respectfully submitted,

B. Richards Creech
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

BRC:ir

PROBATE JUDGES' FEES: Maximum retention of fees permissible
for 1941 and 1942.

February 25, 1944

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FILED
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Honorable Forrest Smith
Auditor, State of Missouri
Jefferson City, Missouri

Dear Mr. Smith:

This office is in receipt of your letter of recent date in which you request an opinion. Omitting caption and signature, this request reads as follows:

"Section 13404, R. S. Missouri, 1939, provides that the Judge of the Probate Court may retain from his earned fees an annual compensation not to exceed the compensation of a Judge of the Circuit Court having jurisdiction in such county.

"Prior to 1939 the compensation of most of the Circuit Judges in Missouri was \$3500.00 but in 1939 Section 13394, R. S. Missouri, 1939, was amended and provides for a compensation of \$1300.00 per annum to the above classified Circuit Judges for their services as Jury Commissioners, making the total compensation for said Circuit Judges on and after the effective date of this amended law \$4800.00.

"We would like for you to render an opinion advising us when the increase in the amount of fees permitted to be retained by a Probate Judge would become effective. The Probate Judges last term ended on December 31, 1942. What would be the maximum retention permissible for 1941 and 1942 by the Probate Judges?"

Inasmuch, as this question has been answered at considerable length in various other opinions, we submit for your consideration an opinion of January 16, 1943, pertaining to the compensation of probate judges; also, our opinion of August 30, 1943, devoted

Hon. Forrest Smith

-2-

Feb. 25, 44

to the consideration of probate judges, under Senate Bill No. 4, together with our opinion of September 20, 1943. which is devoted to the fees and salaries of probate judges, together with our opinion of October 7, 1943.

We believe these opinions fully answer any question raised in your letter and submit same in lieu of another opinion.

Respectfully submitted

L. I. MORRIS
Assistant Attorney General

APPROVED:

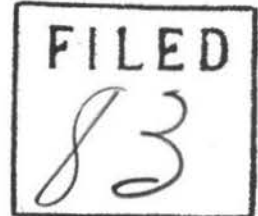
ROY McMITTRICK
Attorney General

LIM:LeC

Encl.

ROADS AND BRIDGES: The word "shall", as used in Section 8514, R. S. Missouri, 1939, is to be construed in a directive or permissive sense; that the words "biennially thereafter", as contained in said section, are to be construed as at least two years must elapse before a County Court shall have authority to change the boundaries of a road district formerly created under said section.

April 21, 1944



Honorable J. P. Smith
Prosecuting Attorney
Webster County
Marshfield, Missouri

Dear Sir:

We are in receipt of your letter of April 6 wherein you request an opinion from this department, which opinion request reads as follows:

"Sec. 8514, R.S. Mo. 1939, provides for the County Court, shall during the month of January 1918, shall divide the County into Road Districts.

"The question is, would it be legal for the County Court, in some other months other than January, to make such road districts? Please answer definitely.

"The same Section further provides, 'Said Courts shall during the month of January biennially thereafter, have authority to change the boundaries of said Road Districts, etc.' 2nd question is: Has the County Court the authority to make a change in any other month of the year, other than January? Please answer direct.

"3rd: The first provision was in January, 1918, it being an even number. Must any change of road district to be legal have to be made in January of an even year after January, 1918?

"4th: Where part of County is in Special Road districts, can the County Court organize that part of the County not in special Road Districts, in what is called special unit Road district, or does it require the entire County to form the unit county road

April 21, 1944

unit? Please give me direct opinion on this question.

"5th; Webster County has several Special Road Districts. The County Court a few years ago, I think in March, not in January as the law provides, organized that part of the County that is not in Special Road Districts in to what is called a County Unit. Can that legally be done? My version is that the County Court has no authority to form a county unit of the roads, unless it included all of the County, and that the County Court has no legal authority to change road districts only in the month of January of even years and not in any other month or years, and if done, it is illegal. Am I right or am I wrong? You tell me what the law is direct.

"When the County Court pretended to organize the County into a County unit, a Road district that had about \$800.00 in cash was taken over by the Unit Road District. The road district wants to be put back where it was before, and their money and machinery returned to them. Can the County Court do that?"

At the outset, we wish to call attention to Section 8514, R. S. Missouri 1939 referred to in your opinion request, which section reads as follows:

"The county courts of all counties, other than those under township organization, shall, during the month of January, 1918, with the advice and assistance of the county highway engineer, divide their counties into road districts, all to be numbered, of suitable and convenient size, road mileage and taxable property considered. Said courts shall, during the month of January biennially thereafter, have authority to change the boundaries of any such road district as the best interest of the public may require."

Now concerning ourselves with the construction that should be placed upon the word "shall" as that term is used in the above section of the statutes, we call attention to the case in re Laub, appeal of Snyder et al., 21 Atl. (2d) 575, 1. c. 580, wherein the court said:

"While the Act contains provisions mandatory in terms, it must be remembered that the word "shall" when used by the Legislature to a court, is usually a grant of authority, and means "may," and even if it is intended to be mandatory it must be subject to the necessary limitation that a proper case has been made out for the exercise of the power.' Anderson's Appeal, 215 Pa. 119, 122, 64 A. 443, 444; Becker v. Lebanon, etc., St. Ry. Co., 188 Pa. 484, 41 A. 612; Pittsburgh v. Coursin, 74 Pa. 400."

In the case of State ex inf. Gentry, Atty. Gen., v. Lamar et al., 291 S. W. 457, 1. c. 458, the court stated the general rule as follows:

"It is a rule of construction that a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, is directory merely, unless the nature of the act to be performed, or the phraseology of the statute is such, that the designation of time must be considered as a limitation of the power of the officer. * * * * * It would be strange if a statute specifying an early day at which an act must be done with a view to its speedy execution, should be construed that the act could not be done at all after the day when the necessity for its performance is as great, if not greater, afterwards than before. If the court had failed to make the appointment in the term time, the clerk could have made it; but clearly when the court convened again, the power of appointment in the clerk was suspended.' St. Louis County Court v. Sparks, 10 Mo. 117, loc. cit. 122, 45 Am. Dec. 355."

April 21, 1944

In the case of State ex. inf. Mitchell, Pros. Atty., ex rel Goodman v. Heath, 132 S. W. (2d) 1001, 345 Mo. 226, l.c. 229, the court said:

" * * * * 'If a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory.
* * * * *"

We further wish to point out that in neither Section 8514, supra, nor any section in Article 3, Chapter 46, R. S. Missouri, 1939, of which Section 8514 is a part, is there contained a penalty provision, nor is there prescribed the result that shall follow should the County Court divide their county into road districts, or should the County Court change the boundaries of such road districts in a month different from January, the month set forth with particularity in Section 8514. Therefore, we must conclude from the reading of the cases that the word "shall," as contained in Section 8514, is directory or permissive and not mandatory.

Now turning to your question No. 1 which reads, "Would it be legal for the County Court in some other months other than January to make such road districts," my answer is that it would be legal because of the fact that it is merely directory that the court shall divide the county into road districts in the month of January. Further, the County Court would have the authority to change the boundaries of such road districts in a different month other than January for the same reason.

In question No. 2 you ask, "Has the County Court the authority to make a change in any other month of the year other than January?" This has been answered in question No. 1.

Your question No. 3 reads as follows: "Must any change of road district to be legal have to be made in January of an even year after January, 1918?" The answer to this question is yes.

We wish to call attention to the last sentence in Section 8514, which sentence reads as follows:

"Said courts shall, during the month of January biennially thereafter, have authority to change the boundaries of any such road district as the best interest of the public may require."

April 21, 1944

It is our view that it is directory whether or not they change the boundaries in the month of January. However, we wish to particularly call attention to the word "biennially", as under the rules of statutory construction it is our duty to give meaning to the word "biennially" and construe it in its common and ordinary meaning in the whole section. The word "biennial" is defined in Webster's Dictionary as follows:

"A space of two years. Happening, or taking place, once in two years; as a biennial election. Continuing or lasting for two years."

Therefore, it is our view that a County Court having once followed the provisions of the first sentence of Section 8514, and having divided the county into road districts with the advice and assistance of the county highway engineer, that a two year period must elapse before the County Court shall have authority to change the boundaries of such road district so created and designated under the provisions as contained in the first sentence of the section.

To sustain our position in this proposition, we call attention to the case of State ex rel. McKittrick, Atty. Gen., v. Carolene Products Co., 144 S.W. (2d) 153, 1. c. 155, 346 Mo. 1049, wherein the court said:

"It is a cardinal rule of construction that every word, clause, sentence and section of an act must be given some meaning unless it is in conflict with the legislative intent. State v. Wipke et al., Mo. Sup., 133 S.W. 2d 354; State ex rel. Kansas City Power & Light Co. v. Smith, 342 Mo. 75, 111 S.W. 2d 513; Holder v. Elms Hotel Co., 338 Mo. 857, 92 S.W. 2d 620, 104 A. L. R. 339.
* * * * *

In answer to questions Nos. 4 and 5, we are herewith enclosing an opinion heretofore rendered by this department to Honorable Charles E. Murrell, Jr., Prosecuting Attorney of Adair County, Kirksville, Missouri, dated December 14, 1939, which in our view answers these two questions specifically.

Answering the question in the last paragraph of your opinion request, we presume you have reference to money and machinery and other property turned over to the road overseer under the provisions of Section 8518, R. S. Missouri 1939. It will be noted that such road overseers are under bond. Further,

April 21, 1944

in Section 8521, R. S. Missouri 1939, each road overseer makes a detailed report under oath to the County Court of the monies received and how expended by him, which report and settlement is duly approved by the court. We presume that this has been adhered to, and in view of what we have heretofore set forth in this opinion, no doubt the last paragraph of your letter is of no further consequence.

It may be pointed out that the road district referred to in the last paragraph of your letter has become extinct, and any changes there would be now brought about by the County Court might or might not in the scope be the same geographic area of the old district. But be this as it may, if a district were now created it would be an entirely new district for all intents and purposes as distinguished in the old district which is not extinct.

CONCLUSION

It is the opinion of this department that the word "shall", as contained in Section 8514, R. S. Missouri 1939, is to be interpreted in a directive and permissive sense as distinguished from a mandatory sense.

It is the further opinion of this department that when a County Court has divided a county into road districts, as is provided in Section 8514, at least two years must elapse before a County Court of the county shall have authority to change the boundary of any road district so created under Section 8514, for said section uses the words "biennially thereafter".

Respectfully submitted,

APPROVED:

B. RICHARDS CREECH
Assistant Attorney General

ROY McKITTRICK
Attorney General

BRC:ml
Enc.

FUND COMMISSION: May not invest escheated funds in government bonds until escheat becomes absolute
ESCHEAT: and money is paid into public school fund
BOARD OF EDUCATION: and then it is duty of board of education to direct such investment.

June 21, 1944

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Sir:

Your letter of June 14th, 1944, is as follows:

"At a special meeting of the Board of Fund Commissioners of the State of Missouri on May 23, 1944, Gov. Forrest C. Donnell requested that we obtain an opinion from your office regarding the following questions:

"1. Does the Board of Fund Commissioners have authority to invest in Government Bonds, moneys paid into the Escheat Fund under the provisions of Article 1, Chapter 3, R. S. Mo. 1939?

"2. Does the Board of Fund Commissioners have authority to invest in Government Bonds, impounded insurance funds paid into the Escheat Fund March 23, 1944 and designated 16-2/3% State Case Fire Insurance Refund Section 5985A, Laws of Missouri 41, page 396?"

I

In Laws of Missouri 1941, at page 366, Article 1, Chapter 3, R. S. Mo. 1939, relating to escheats, was amended. Section 642a of the 1941 amendment provides:

"The State Board of Fund Commissioners shall invest all moneys paid into the State Treasury under the provisions of

Article I, Chapter 3, Revised Statutes of Missouri, 1939, that have accumulated, or may hereafter accumulate, in the State Treasury in registered United States Government and State of Missouri bonds, at not less than par value, and shall at all times keep said Fund so invested, provided that said board shall keep in the State Treasury in cash the amount appropriated by the General Assembly each biennium to pay claims duly approved under the provisions of Sections 623 and 624 of Article I, Chapter 3, Revised Statutes of Missouri, 1939."

This section is very clear and definite in meaning, and unless it appears that the Constitution prohibits the General Assembly from providing for the investment of escheat funds in government bonds, the first question presented must be answered in the affirmative.

Section 43, Article IV, of the Missouri Constitution, provides:

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law. * * * * *"

Section 19, Article X, of the Missouri Constitution, also provides:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; * * * * *"

In *Lawson v. Baker*, 220 S. W. 260, 268 (Tex.) a similar constitutional provision was under discussion, and the court observed:

"Whatever may be the precise meaning of the prohibition in the Constitution that no money shall be drawn from the treasury but in pursuance of specific appropriations made by law, it would seem not to admit of serious argument that it will be effective to prohibit the Legislature, or any officer under its direction, from lending or investing state funds, except as authorized in the Constitution."

It is difficult to see how this meaning was given to such a restriction on the withdrawal of money from the treasury, unless it be considered that all such withdrawals by appropriation had to be for the purpose of paying obligations of the State. Such meaning can logically be given the Missouri provisions when read in connection with Section 15, Article X of the Constitution which directs how money in the treasury may be invested. This latter provision, by covering the entire subject of withdrawals from the treasury for investment, of necessity leaves Section 43, Article IV and Section 19, Article X, as only authorizing withdrawals by appropriations for the purpose of paying obligations. The three sections, when considered together, clearly make Section 642a, supra, invalid. Section 15, Article X of the Missouri Constitution provides:

"All moneys now, or at any time hereafter, in the State treasury, belonging to the State, shall, immediately on receipt thereof, be deposited by the Treasurer to the credit of the State for the benefit of the funds to which they respectively belong, in such bank or banks as he may, from time to time, with the approval of the Governor and Attorney General, select, the said bank or banks giving security, satisfactory to the Governor and Attorney General for the safekeeping and payment of such deposit, when demanded by the State Treasurer on his check--such bank to pay a bonus for the use of such deposits not less than the bonus paid by other

banks for similar deposits; and the same, together with such interest and profits as may accrue thereon, shall be disbursed by said Treasurer for the purposes of the State, according to law, upon warrants drawn by the State Auditor, and not otherwise."

This section specifically provides how money in the treasury shall be invested, and is exclusive since it covers "all moneys * * * in the State treasury." To put part of the money in the treasury in government bonds is certainly not depositing it in banks as directed. This deposit was clearly considered as a form of investment for it is expressly provided that such banks are "to pay a bonus for the use of such deposits not less than the bonus paid by other banks for similar deposits."

It therefore appears that the Constitution prescribes the only way funds in the treasury may be invested, and that being so, a statute of the General Assembly directing otherwise would be invalid.

We are fortified in this conclusion by the provisions of Sections 6 and 9 of Article XI of the Missouri Constitution. Section 6 defines what shall constitute the public school fund, and then expressly provides that said fund shall be "securely invested and sacredly preserved." Section 9 then provides the form of investment, as follows:

"No part of the public school fund of the State shall ever be invested in the stock or bonds or other obligations of any other State, or of any county, city, town or corporation; and the proceeds of the sales of any lands or other property which now belong or may hereafter belong to said school fund shall be invested in the bonds of the State of Missouri, or of the United States."

This fund is also under the control of the treasury and therefore we see that the authors of the Constitution of 1875 considered it necessary to expressly provide for the investment of the school fund in government bonds. The

obvious reason that made this necessary was the fact that Section 15, Article X, supra, directed that all money in the treasury should be invested in banks.

CONCLUSION

It, therefore, is our opinion that the funds arising under Article 1, Chapter 3, R. S. Mo. 1939, relating to escheats, may not be invested in government bonds, as directed by Section 642a, Laws of Missouri 1941, because contrary to the constitutional direction for the investment of all funds in the treasury as contained in Section 15, Article X.

II

Section 5985a, Laws of 1941, page 397, provides that certain insurance premiums impounded with the Superintendent of Insurance pending review of rate orders shall, upon final termination of the review be returned to the persons or companies entitled thereto; that, if after diligent attempts have been made to return said money there remains any not returned because the owner is unknown:

"* * * said money shall escheat and vest in the State of Missouri, and it shall be the duty of said Superintendent of Insurance to pay the same to the State Treasurer * * * and such money shall be credited to a fund to be designated as 'escheat' * * * *"

where it is to be held for five years during which persons having claims thereto may establish the same and be paid. Thereafter, said money:

"* * * after remaining therein unclaimed for five years shall escheat and vest absolutely in the State, and all persons or corporations shall be forever barred and precluded from setting up title or claim to any of said funds, and the same shall be on the order of the Board of Funds Commissioners transferred to the general revenue fund of the State * * *"

It is clear that the funds dealt with in this section are those resulting from impoundments growing out of insurance rate increases and decreases under Article 8, Chapter 37, R. S. Mo. 1939.

Section 642a, Laws of 1941, page 366, aside from the fact that it is invalid, cannot be taken as authority to invest these funds in government bonds, because by its own terms it only applies to funds arising under Article 1, Chapter 3, R. S. Mo. 1939, while these escheated insurance funds arose under Article 8, Chapter 37, R. S. Mo. 1939.

Examination of our statutes does not disclose any other provisions purporting to authorize the investment of these escheated insurance funds in government bonds.

CONCLUSION

It, therefore, is our opinion that the insurance funds escheated under Section 5985a, Laws of 1941, page 397, may not be invested in government bonds.

III

However, even though we have reached the two conclusions above set out, there will come a time when the money arising under Article 1, Chapter 3, R. S. Mo. 1939, and perhaps the funds arising under Section 5985a, Laws of 1941, page 397, may be invested in government bonds.

The escheat created in Article 1, Chapter 3 R. S. Mo. 1939, is interlocutory for a period of twenty-one years (Sec. 642, R. S. Mo. 1939), after which if the money or property escheated remains unclaimed it is to become a part of the public school fund (Sec. 642, R. S. Mo. 1939; Sec. 6, Art. XI Mo. Const.) and may be invested in government bonds by the State Board of Education under the terms of Section 10874, R. S. Mo. 1939, and Section 9, Article XI of the Missouri Constitution.

The escheat created in Section 5985a, Laws of 1941, page 397, is interlocutory for a period of five years, after which, if the money escheated remains unclaimed it is, according to the terms of that section, to be "transferred to the general revenue fund of the State."

The validity of the portion just quoted from Section 5985a is open to question under Section 6, Article XI of the Missouri Constitution, which provides:

"* * * the net proceeds of all * * * property and effects that may accrue to the State by escheat, * * * shall be paid into the State Treasury, and securely invested and sacredly preserved as a public school fund; * * *"

There can be no question that these impounded insurance funds have "accrued to the State by escheat" and that being true when the escheat becomes absolute, upon the expiration of the five year period, the money unclaimed becomes a part of the public school fund under the Constitution, and may be invested in government bonds by the State Board of Education under the terms of Section 10874, R. S. Mo. 1939, and Section 9, Article XI of the Missouri Constitution.

CONCLUSION

It, therefore, is our opinion that the funds arising under Article 1, Chapter 3, R. S. Mo. 1939, and under Section 5985a, Laws of 1941, page 397, may be invested in government bonds by the State Board of Education when the escheat becomes absolute and the money is paid into the public school fund.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

LLB:CP

POOL, BILLIARD AND OTHER TABLES: Construction of cert in sections contained in Chapter 135, with reference to issuing license.

October 10, 1944

10/11

Honorable J. P. Smith
Prosecuting Attorney
Webster County
Marshfield, Missouri



Dear Sir:

We have your opinion request of recent date, which request reads as follows:

"In regard to pool tables which come as I understand under Chapter 135, R.S. Mo. 1939, on pages 3900 & 3901.

"There has been a party here that bought a Pool Hall, run it a short time and sold it, had no license, and he bought another Pool Hall and has not paid any license, and the matter was called to my attention, and he said that there had been license bought by the former owner, or the Pool Hall, and they had not expired, and that he thought that he could run on them until they were out.

"I told him that I thought the license was not transferable and that he should have license issued to him direct, and that he could not operate on the license of the former owner. Am I right or wrong? Let me have your opinion on this question.

"He operated the first Pool Hall he bought about 4 or 5 months till he sold it, and the second one he is operating now he bought in June or July, and has sold it, to deliver it to the purchaser on October 1st, 1944.

"Sec. 15389, R.S. Mo. 1939, license to be issued for twelve months. He wants to pay

for just the time he operated the last one. Each of them had unexpired license issued to former owner, and the time of the license had not expired. My version of the law that the license is not transferable, and must be issued for twelve months in the name of the owner and operator and not just for the time that he may stay in business. Am I right or am I wrong? Let me have your opinion on this point, also."

Section 15397, Revised Statutes of Missouri 1939, reads as follows:

"The county court shall have power to license the keepers of billiard tables, pigeonhole tables, jenny lind tables, and all other tables kept and used for gaming, upon which balls and cues are used. At each term, the clerk of said court shall prepare and deliver to the collector of their counties as many blank licenses for the keepers of such tables, hereinbefore mentioned, as the respective courts shall direct, which shall be signed by the clerk and attested by the seal of the court."

Section 15398, Revised Statutes of Missouri 1939, provides as follows:

"The collector shall deliver to any person who shall have been licensed, a license to keep any such table mentioned in the next preceding section in their respective counties, for a term of twelve months, upon the payment by the applicant of the sum of twenty dollars for each billiard table, and ten dollars for each other table described in said section, and the collector shall countersign such license before delivering the same to the applicant; Provided, that if the applicant be the keeper of more than one of such tables, the number may be named in one license, and in such case the clerk shall not be entitled to more than one fee as provided in section 15401."

Section 15399, Revised Statutes of Missouri 1939, reads as follows:

"No county court, city or town authorities shall levy a greater amount for a license tax on any table mentioned in section 15397, for county, city or town purposes, than is allowed for state purposes."

In the case of State ex rel. Hawkins v. Harris, 304 Mo. 309, 263 S.W. 807, 1.c. 810, the court said:

" * * * * It is not necessary in this case to undertake to define with precision the powers thus conferred upon these classes of municipalities. The reference is made as to a matter indicative of the legislative policy of the state. In view of that, and of the prior holdings of this court, the conclusion is reached that the granting of such a license is the conferring of a privilege, not the granting of a right; that it is within the sound discretion of the county court to confer or to withhold the privilege, and that this discretion cannot be revised or controlled by a court of superintending control by writ of mandamus, and the writ should be denied herein."

It will be noted from the reading of the above excerpt and ruling of the court in the Harris case, supra, that the granting of the license by the county court is the conferring of a privilege, and not the granting of a right, and that such county court has the sound discretion to confer such privilege or to withhold such privilege as it may see fit.

In the case of Ragan v. McCoy, 29 Mo. 356, 1.c. 368, the court, with reference to a license to run a ferry, said:

" * * * * The right to keep a ferry is a personal privilege sold to the person obtaining the license, and is not transferable. * * * *"

The following will be noted from reading 37 Corpus Juris 245, Sec. 107:

"Unless a transfer is permitted by the license statute or ordinance, a license is generally regarded as a special

October 10, 1944

privilege of personal trust and confidence which cannot be assigned or transferred without the consent of the licensing authorities, * * * *."

From the reading of Chapter 135, Revised Statutes of Missouri 1939, it will be noted that the Legislature has not made licenses issued by the county court transferable, therefore the rule is controlling as laid down in the McCoy case, supra, and likewise in Corpus Juris, supra.

Turning to your question of whether or not the license may be issued for a shorter period of time than 12 months, it will be noted from the reading of Section 15397, supra, that the county court shall deliver to the county collector as many blank licenses for issuance to keepers of such tables heretofore mentioned as the respective court shall direct.

When the county court makes its order of record that a person shall be licensed as a keeper of tables, as contemplated by Chapter 135, Revised Statutes of Missouri 1939, then Section 15398, supra, provides that the collector shall deliver to the person whom the county court has licensed under the provisions of Section 15397, supra, such licenses upon the payment by such person of the sum of \$20.00 for each billiard table and \$10.00 for each other table described in Section 15397, supra, and that such license shall be for a term of 12 months.

Upon the reading of Section 15399, supra, it will be noted that this section interprets Section 15398, supra, and provides that the amounts set out in Section 15398, supra, are the sums of money that go to the State as a state tax. Section 15399, supra, further provides that the county, city or town authorities shall not have authority to levy a greater amount for a license tax.

It is our view that under the rule of statutory construction laid down in the case of Keane v. Strodtman, 323 Mo. 161, 18 S.W. (2d) 896, 1.c. 898, the county court would not have the right to license for a lesser term than the 12 month period prescribed in Section 15398, supra.. In the above case the court said:

"Certainly where, as at bar, the statute (section 8702) limits the doing of a particular thing to a prescribed manner, it necessarily

includes in the power granted the negative that it cannot be otherwise done. This is the general rule as to the application of the maxim. Even more relevant under the facts in this case is the interpretation given to it by the Kansas City Court of Appeals in *Dougherty v. Excelsior Springs*, 110 Mo. App. 623, 626, 75 S.W. 112, 113, to this effect: 'That when special powers are conferred, or where a special method is prescribed for the exercise and execution of a power,' that exercise is 'within the provision of the maxim * * * and * * * forbids and renders nugatory the doing of the thing specified except in the particular way pointed out.'

It is further our view that should the holder of a license be precluded for any reason from operating his table or tables for a shorter period of time than 12 months, he would not be entitled to a refund of any of the money so paid either to the state, county, city or town authorities as a matter of right, for the reason that, as has heretofore been pointed out, he merely has a privilege to operate said tables by virtue of the discretion placed in the county court to grant such license.

There is contained no statute in Section 135, Revised Statutes of Missouri 1939, which gives the county court the authority to refund any moneys so paid to the licensee. Neither is there contained a statute which allows the county court to issue such license by express provision for a lesser time than 12 months, and under authority of the *Keane v. Strodman* case, supra, the Legislature has prescribed a certain way for the issuing of the license and through the rule of statutory construction so stated in this case it necessarily follows that any other method is excluded. However, under Section 15399, supra, the county court would have a right to levy any amount of tax, so long as it did not exceed the sum of \$20.00 for each billiard table and \$10.00 for each other table described in Section 15397, supra, for a 12 month period.

CONCLUSION.

It is the opinion of this department that:

(1) The granting of a license to operate pool, billiard and other tables designated in Chapter 135, Revised Statutes

October 10, 1944

of Missouri 1939, is the conferring of a privilege, and not the granting of a right.

(2) That the county court has the sound discretion to confer or withhold such privilege.

(3) That a license once granted is not transferable.

(4) That such license cannot be given for a shorter period of time in the first instance than 12 months.

(5) That, if for any reason such person is precluded from operating such tables described in the license for the full term of 12 months, he is not entitled to a rebate for that portion of the time which he did not operate such tables, as a matter of statutory right.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
Acting Attorney General

BRC:ml

2 2 6
SCHOOLS. : Money received by consolidated district
: from consolidation of school house
: must be paid into "Building Fund."
:

October 27, 1944

Honorable Wayne V. Slankard
Prosecuting Attorney
Newton County
Neosho, Missouri

11/10
FILE

83

Dear Mr. Slankard:

This will acknowledge the receipt of your letter of October 17, requesting an opinion of this office, which is as follows:

"I would like your opinion on the following:

"A consolidated school district in this county had one of their school sites and school houses taken by condemnation for Camp Crowder. The funds constituting the proceeds of this condemnation were deposited by the Board of Directors in their building fund. They do not contemplate building a new high school to replace the one taken since they are so near Neosho and want to know whether or not they can transfer these funds to the incidental fund."

Section 10366 Laws of Missouri, 1943, p. 893 provides:

"All school moneys received by a school district shall be disbursed only for the purposes for which they were levied, collected, or received. * * * All moneys derived from taxation or received from the state for the erection of school buildings, from sale of school sites, school house or school furniture, from insurance, from sale of bonds shall be placed to the credit of the "Building Fund".

Section 10471 R. S. Mo., 1939, provides:

"When the demands of the district require more than one public school building therein, the board shall, as soon as sufficient funds have been provided therefor, establish an adequate number of primary or ward schools, corresponding in grade to those of other public school districts, and for this purpose the board shall divide the school district into school wards and fix the boundaries thereof, and the board shall select and procure a site in each newly formed ward and erect a suitable school building thereon and furnish the same; and the board may also establish schools of a higher grade, in which studies not enumerated in section 10627 may be pursued; and whenever there is within the district any school property that is no longer required for the use of the district, the board is hereby authorized to advertise, sell and convey the same, and the proceeds derived therefrom shall be placed to the credit of the building fund of such district. (R. S. 1929, Sec. 9330.)"

Your letter states that the district here is a consolidated school district and it is difficult to see how it would not come within the specific provisions of Sec. 10471 and 10366, which require the money from the sale of school sites to be placed in the "building fund."

Before the amendment of Sec. 10366 by the 1943 session of the legislature there was a provision to the effect that if there was a balance remaining in the building fund after the purpose for which said fund was levied was accomplished the board would have the power to transfer the balance to the incidental fund. However, this provision was left out of the section by the amendment of 1943.

It should also be pointed out that the money originally obtained to build the school was obtained by taxation for that particular purpose. Section 10366 supra, also contains the provision that money received by a school district shall be disbursed only for the purposes for which they were levied, collected or received. It would seem therefore, that the money received from the condemnation of this building would still be dedicated to the purpose for which it was originally obtained.

Hon. Wayne V. Slankard

-3-

Oct. 27, 1944

CONCLUSION.

It is therefore the opinion of this office that money received by a consolidated school district through condemnation of a school house must be paid into the "Building Fund" of the district.

Respectfully submitted

ROBERT J. FLANAGAN
Assistant Attorney General

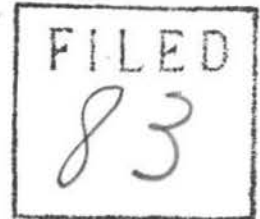
RJF:LeC

APPROVED:

VANE C. THURLO
Acting Attorney General

TAXATION: County collector in counties of 200,000 to 700,000 population not entitled to fees allowed by Section 11117, but county clerk is entitled to fees allowed him by said section.

November 30, 1944



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Attention: Mr. B. E. Ragland, Chief Clerk

Dear Sir:

We have your letter of recent date in which you submit to this office the following question:

In connection with the collection of taxes in counties of 200,000 to 700,000 population, are the fees provided by Section 11117 to be charged in addition to the fees provided by Section 11395? (Reference to statutes in this opinion is to Revised Statutes of Missouri, 1939.)

By Section 11378 the making of tax books, extension and collection of all taxes upon real and personal property in such counties is governed by the provisions of Article 22 of Chapter 74 of the Statutes.

Section 11395 of said Article 22 reads as follows:

"Fees shall be allowed for services rendered under the provisions of this article as follows: To the collector two per cent on all sums collected; to the collector in cities named in Section 11202 two per cent on all sums collected--such per cent to be taxed as costs and collected from the party redeeming. To the county collector for making the 'Back tax book', twenty-five cents per tract, to be taxed as costs and collected from the party redeeming such tract. To the circuit clerk, justice of the peace,

sheriff and printer, such fees as are allowed by law for like services in civil cases, which shall be taxed as costs in the case: * * * * "

By the foregoing section, all services required to be performed under said Article 22 are to be paid for by the fees set out in said Section 11395.

Section 11396 of said Article 22 reads as follows:

"The general law as now existing in all matters relating to taxation and the collection of delinquent and back taxes not specifically provided for in this article shall continue to be the law for counties coming within the operation of this article, and all laws or parts of laws in conflict with this law insofar as they conflict with this law shall be and hereby are repealed."

By this latter section (11396), it is made clear that if there are any matters relating to taxation and the collection of delinquent and back taxes which are not specifically provided for in Article 22, such matters are to be governed and regulated by the general law on such matters.

Section 11395 only purports to provide compensation for services required to be performed by Article 22, Chapter 74. If, therefore, Section 11117 covers matters not specifically provided for by said Article 22, then said section controls as to such matters.

Section 11117 provides, in part, as follows:

"Hereafter as often as any delinquent tax list or bills shall be received by the county court or other proper tribunal or officer from collectors at their annual settlements, the same, except as to the list of delinquent lands, shall be made by the county clerk, and as to the delinquent lands the same shall be entered of record in the county collector's office by the collector, if in counties, and if in cities containing a population of five thousand or more inhabitants, by the proper

officer, into a 'back tax book,' containing the same facts and in the same form as provided in sections 11120 and 11124, as to lands, city and town lots now delinquent; * * * * all taxes hereafter becoming delinquent shall bear interest until paid as provided by section 11124, and shall also be subject to the same fees, commissions and charges as in this chapter provided for taxes now delinquent, except that for making and recording the delinquent land list, the collector who makes such book and the clerk or other officer who makes the 'back tax book' shall receive only ten cents per tract, city or town lot, and the clerk for comparing and authenticating such record of the delinquent list of land and lots as made by the collector shall receive five cents per tract, city or town lot."

It will be seen that said section requires the county clerk to do certain things which are not required of said official by Article 22 of Chapter 74. Said section provides specific compensation for the duties performed by the clerk under said Section 11117. As pointed out above, Section 11117 is a part of the general law, and since it provides for certain duties not mentioned in Article 22 of Chapter 74, it is, under the provisions of Section 11396, still in force and effect as to such matters. Since the services required of the county clerk by Section 11117 are not required by Article 22 of Chapter 74, it follows that the clerk is entitled to such compensation as said Section 11117 provides for these particular services.

There is nothing in Article 22 of Chapter 74 which specifically requires the county collector to record in his office the delinquent land list. By the reasoning above, it would seem to follow that the fees provided by Section 11395 would not apply to such services. However, Section 11395 specifically provides fees to the county collector, and among them are, "To the county collector for making the 'Back tax book', twenty-five cents per tract, * * *." It seems clear, therefore, that by Section 11395, which was passed after Section 11117, the Legislature intended to provide a new schedule for the fees of the county collector for making the "back tax book." In interpreting any statute, it is, of course, the proper rule to try to ascertain the intention of the Legislature, and in the face of the plain language of Section 11395 with respect to the compensation for making the "back tax book", it can hardly be doubted that the Legislature meant to make a new provision for

payment for that service. The provisions of Section 11117 and Section 11395 with respect to fees for making the "back tax book" cannot both stand since they are in conflict. Section 11395, being the later statute, would prevail over Section 11117 with respect to that provision. To apply the strict reasoning applied in the first part of this opinion with respect to county clerks would result in a holding that Section 11117 controlled as to the fees of the county collector in making the "back tax book", and would make the provisions of Section 11395 with respect to said fees meaningless. We do not believe this would be justified in the face of the plain language of Section 11395.

CONCLUSION

It is, therefore, the opinion of this office that in counties of 200,000 to 700,000 population the county clerk is entitled to the fees provided by Section 11117 for services required of him therein, but that the county collector is not entitled to the fees provided by Section 11117 for making the "back tax book", the fees of the collector being controlled by Section 11395.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

HHK:HR

ELECTIONS:

Inductees not yet
sworn in cannot vote
an official war ballot.

May 15, 1944.

5/23



Mr. W. H. Sperry
Clerk of the County Court
Clinton, Missouri.

Dear Mr. Sperry:

We have your request for an official opinion of this office
which is as follows:

"Will you oblige by rendering an opinion
on the following question? Are military
inductees permitted to cast an "Official
War Ballot" in the primary election of
1944, by voting in person at the county
clerk's office in Henry County Mo., on
or before they are transported to their
training centers."

The answer to your question depends upon a construction
of Senate Bill No. 6, passed at the special session of
the last legislature. For the purpose of this opinion, we
are assuming that you mean by the term "inductees" persons
who have taken the pre-induction physical, but who have
not yet been sworn in to any branch of the service.

The title to the act reads as follows:

"Providing for voting absentee ballots by
members of the military or naval forces,
relating to the duties of the Secretary of
State, county clerks and election officials
in respect to such voting, and providing
penalties for violations of the provisions
of this act, with an emergency clause."
(Underscoring ours)

Section 1 of the Act reads in part as follows:

"Any person being a duly qualified elector
of the State of Missouri who is absent,
or who expects to be absent, from the
State or from the county in which he is
a qualified elector, on military or naval
service * * *" (Underscoring ours)

It would seem from a reading of Section 1 that the Act meant to apply to inductees who had passed their physical but had not been sworn in. Section 2 of the Act however provides in part as follows:

"For the purpose of making application for an absentee war ballot to be voted in a general or special election by such absent voter as mentioned in this Act, the application by post card, which is provided for under the 'War Ballot Act' of the 77th Congress, Public Law 712, H. R. 7416, or any written request, telegram, cablegram or radiogram wherein are stated his name, voting address and the address to which the ballot desired by him is to be sent, shall be received and taken by the Clerk of the County Court or Board of Election Commissioners as an application to vote the absentee ballot provided for under this Act. For the purpose of making application for an absentee war ballot to be voted in a primary election by such absent voter, the applicant by any written request, telegram, cablegram or radiogram may make request to the Clerk of the County Court or Board of Election Commissioners of the County or City of his legal residence at the time of his induction into the armed forces, stating in his communication his name, voting address, and the military station, military post office or military address of his present station to which the ballot desired by him is to be sent."

* * *

"Application for an official war ballot for any elector in the armed services of the United States, to be cast in any election, may be made in writing to the county clerk or to the board of election commissioners in the county or city in which the absentee elector was a legal resident at the time of induction into military or naval service, by the father, mother, spouse or next of kin of such person. In such case the applicant shall state under oath relationship between the person applying for ballot and the absentee elector and the military or naval status of the person in the armed service,

May 15, 1944

insofar as is known, for whom application is being made, his legal residence at the time of induction and his address to which the ballot is to be mailed." (Underscoring ours)

Section 5 which gives the form of the ballot has the following declaration:

"I declare under the penalties of perjury that I am a legally qualified voter of _____, Missouri. The County Clerk or Board of Election Commissioners will print the name of the County or City in the above space) My name together with my voting address at the time of my induction into the armed forces are correctly given below. I am at the present time in the military or naval service of the United States and in the course of my duty in such military service I expect to be absent from my voting precinct on the date of said election. I have not and will not vote elsewhere than at my legal voting residence, or otherwise than by this ballot at this election." (Underscoring ours)

The rule in construing such statutes is stated in the case of *Bowers v. Missouri Mut. Ass'n*. 62 S.W. (2d) 1058, 1.c. 1063. We quote:

"But all of its provisions must be considered as well as its evident purpose and its proper construction gathered from the whole, giving due effect to all parts thereof. Where certain terms of a statute are ambiguous, we are at liberty to go to the title of the act as a clue or guide to the intention of the Legislature. *Straughan v. Meyers*, 268 Mo. 580, 588, 187 S.W. 1159; *State ex rel. Bixby v. City of St. Louis*, 241 Mo. 231, 248, 145 S.W. 801. Laws are passed in a spirit of justice and for the public welfare and should be so interpreted if possible as to further those ends and avoid giving them an unreasonable effect. *Gist v. Rackliffe-Gibson Constr. Co.*, 224 Mo. 369, 384, 123 S.W. 921. In arriving at the legislative intent, doubtful words of a statute may be enlarged or restricted in their meaning to

May 15, 1944.

conform to the intent of the lawmakers, when manifested by the aid of sound principles of interpretation. *Straughan v. Meyers*, supra, 268 Mo. loc. cit. 588, 187 S.W. 1159; *City of St. Louis v. Christian Brothers College*, 257 Mo. 541, 552, 165 S.W. 1057; *State to Use, etc., v. Heman*, 70 Mo. 441, 451. And it has been said that 'while we have no right to construe a law by our view of its expediency, we can take that feature into consideration in attempting to ascertain what was in the legislative mind.' *State ex rel. Asotsky et al. v. Regan*, 317 Mo. 1216, 1224, 298 S.W. 747, 749, 55 A.L.R. 773." (Underscoring ours)

CONCLUSION

It is the opinion of this office that since the title of the Act and sections 2 and 5 apply strictly to persons in the armed services, inductees who have not yet been sworn in are not entitled to vote the official war ballot, the provisions of Section 1 notwithstanding.

Respectfully submitted,

GAYLORD WILKINS
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

GW.sc

COUNTY COURT:) County court may change the boundaries of road
ROAD DISTRICTS:) districts and may organize only one such
district for the whole county.

February 1, 1944



Honorable E. H. Stark
Judge of County Court
District No. One
Miller County
Eldon, Missouri

Dear Sir:

We acknowledge receipt of your letter of January 27, 1944, in which you request the opinion of this department. Your opinion request reads as follows:

"Prior to two years ago all of the road districts lying in that portion of Miller County which is north of the Osage River, with the exception of the Eldon Special Road District, disorganized. None of the special road districts lying in the territory south of the Osage River, including what is known as the Kaiser Special Road District, the Atwell Special Road District, the St. Elizabeth Special Road District, the Big Tavern Special Road District, and the Iberia Special Road District, disorganized. Then the County Court by its order organized the County into two common road districts, Road District No. One, including all of the territory lying north of the Osage River not included in the Eldon Special Road District, and District No. Two, including that territory not included in the other above mentioned special road districts and lying south of the Osage River. By this division the County Court then allocated all of the road funds to the two common road districts in accordance with the taxes collected therein.

"This method of division and distribution was continued until January 3rd of this year. At that time the Court made an order abandoning the two common road districts heretofore formed and organized one common road district for the entire County which includes all of the territory of the County not organized into any special road Districts.

"As the matter now stands, the County Court has the power to use the road revenue in the one common road district in any part it may desire, and it may be seen that while a greater part of the revenue comes from what was, prior to January 3rd of this year, Common Road District No. One, the Court might use all of that revenue in what was prior to January 3rd, Common Road District No. Two, when, as a matter of fact, the assessed valuation of old road district No. Two is much smaller than that of old road district No. One.

"I should like to inquire if under the law the Court has the power to do as it did on this January 3rd, abandoning Common Road Districts No. One and Two, as above set forth, and reorganizing into one county-wide common road district including all of the territory in all of the County not organized into special road districts. I would appreciate your opinion on this question."

Section 3514, R. S. Mo. 1939, provides:

"The county courts of all counties, other than those under township organization, shall, during the month of January, 1918, with the advice and assistance of the county highway engineer, divide their counties into road

Feb. 1, 1944

districts, all to be numbered, of suitable and convenient size, road mileage and taxable property considered. Said courts shall, during the month of January biennially thereafter, have authority to change the boundaries of any such road district as the best interest of the public may require."

Attention should be directed to the last sentence of the above section of the statutes. The county court in the very words of the statute has "authority to (biennially after the year 1918) change the boundaries of any such road district as the best interest of the public may require." It is entirely within the discretion of the county court to decide whether the best interests of the county will be served by the organization of one, rather than two, general or common road districts.

The question now present is whether the statute in specifying "road districts" (plural) precludes the formation of but a single district consisting of territory co-extensive with the boundaries of the county. In this connection we enclose herewith an opinion dated December 14, 1939, rendered to Honorable Charles E. Murrell, Jr., Prosecuting Attorney, Adair County, Kirksville, Missouri.

Conclusion

It is the opinion of this department that the county court could abandon Common Road District No. One and Common Road District No. Two and form but a single common road district with boundaries co-extensive with those of the county but excluding territory within special road districts.

Respectfully submitted,

APPROVED:

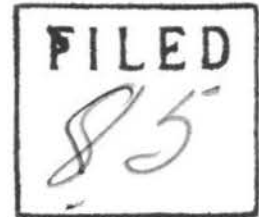
RALPH C. LASHLY
Assistant Attorney-General

ROY McKITTRICK
Attorney-General

RCL:EG

STATE BOARD OF HEALTH:) Sec. 71, Laws of Mo., 1943, p. 256, gives
MERIT SYSTEM:) authority to State Board of Health to establish
and operate under a merit system of personnel
administration.

June 13, 1944



Dr. James Stewart
State Health Commissioner
Jefferson City, Missouri

Dear Sir:

The Attorney General acknowledges receipt of your letter of June 6, 1944, requesting the opinion of this department, which letter reads as follows:

"In order to comply with the Act of Congress and with the regulations of the U. S. Public Health Service pertaining to matching the funds, this Board is now contemplating the setting up and putting into operation a Merit System of Personnel Administration.

"We therefore, would like an opinion from your office regarding the following question.

"Does this Board have the authority to establish and operate under a Merit System of Personnel Administration in order to comply with the above mentioned Act of Congress and Federal regulations, the cost to be borne by Federal Funds?

"We would appreciate very much receiving this opinion as quickly as possible in order to meet the requirements and to obtain Federal allotments which are available to Missouri."

June 13, 1944

Title V, Part 1, Section 501, Social Security Act, as amended, reads as follows:

"For the purpose of enabling each State to extend and improve, as far as practicable under the conditions in such State, Services for promoting the health of mothers and children, especially in rural areas and in areas suffering from severe economic distress, there is hereby authorized to be appropriated for each fiscal year, beginning with the fiscal year ending June 30, 1936, the sum of \$5,820,000. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Chief of the Children's Bureau, State plans for such services."

Title V, Part 1, Section 503, Social Security Act, as amended, reads:

"(a) A State plan for maternal and child-health services must (1) provide for financial participation by the State; (2) provide for the administration of the plan by the State health agency or the supervision of the administration of the plan by the State health agency; (3) provide such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Board shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are necessary for the proper and efficient operation of the plan; * * * * *

Section 10.407 of the Rules and Regulations of the United States Public Health Service, governing allotments and payments to the states for venereal disease control activities, as amended August 30, 1943, reads as follows:

"When Federal funds paid hereunder are utilized for the training of venereal disease control personnel, each State shall conform to 'Training Policies of the United States Public Health Service' as amended to July 1, 1943. Each State shall establish and maintain (1) acceptable administrative and fiscal procedures; and (2) a system of personnel administration on a merit basis in accordance with 'Merit System Policies of the United States Public Health Service' as amended to May 15, 1942."

Title 6 of the Social Security Act sets forth the Merit System Policies of the United States Public Health Service and contains provisions relative to establishment of merit system of personnel management in State and local health departments. Under these regulations the Public Health Service reviews merit system plans developed by the States and territories in order to determine whether such plans are in conformity with accepted standards of personnel administration.

Section 71, Laws of Missouri, 1943, page 256, reads as follows:

"In order to secure to the State Federal Funds allotted or available, the State Board of Health, the State Auditor and the State Treasurer, respectively, are hereby authorized and directed to receive, deposit, expend and dispense any allotments, advancements, grants, or contributions of federal funds as United States Public Health Service Title VI funds, Venereal Disease Control Funds, Children's Bureau Title V, Part 1, funds or any other federal health funds, for health purposes, and to comply with the provision of any act of Congress, or with any rule, regulation or condition of any agency of the

United States acting under the provisions of federal law providing for the allotment and expenditure of such funds; and should any such act, rule, regulation or condition require the deposit of any such funds in the State Treasury or in a trust fund or with such State Board of Health, Auditor or Treasurer, as trustee, then the said Board, Auditor and Treasurer are hereby authorized and directed to receive, deposit and expend such funds in the manner required by such act, rule, regulation or condition and all such funds so deposited shall stand and are hereby appropriated to said Board, Auditor and Treasurer to be applied in the manner and for the purpose set forth in such act, rule, regulation or condition. When required by such act, rule, regulation or condition, the State Auditor is hereby authorized and directed to audit and issue warrants for, the State Treasurer is hereby authorized and directed to receive, deposit and handle, as trustee or otherwise, any such funds and to pay out same, all in the manner required by such act, rule, regulation or condition; and for such purposes there is hereby appropriated out of any such federal funds so deposited in the State Treasury the sum of Four Million Dollars (\$4,000,000.00) for the years 1943 and 1944, or so much thereof as may be available and necessary for such purposes, the amount hereby appropriated being in addition to all other appropriations made by this act."

This section provides for the establishment by the State Board of Health of a merit system of personnel and this authority is given by the plain words of the statute. There is no ambiguity nor the need of any construction being placed on this statute, since its meaning and purpose is perfectly clear.

Conclusion

It is the opinion of this department that Section 71, Laws of Missouri, 1943, page 256, gives authority to the State

Dr. James Stewart

-5-

June 13, 1944

Board of Health to establish and operate under a merit system of personnel administration.

Respectfully submitted,

RALPH C. LASHLY
Assistant Attorney-General

APPROVED:

ROY McKITTERICK
Attorney-General

RCL:EG

ELECTION LAWS: Section 11539, Laws Mo. 1941, p. 355 and Section 11539, Laws Mo. 1941, p. 365, when considered together are not in conflict.

May 22, 1944

Honorable Gregory C. Stockard
Secretary of State
Jefferson City, Missouri



Dear Mr. Stockard:

The Attorney-General acknowledges receipt of a letter from your predecessor, Honorable Dwight H. Brown, dated April 11, 1944, requesting the opinion of this Department, which letter of request reads as follows:

"The 1941 General Assembly enacted House Bill 502, which was approved by the Governor July 24, 1941, repealing Section 11539, Revised Statutes of Missouri 1939, and enacting a new Section 11539 in lieu thereof as set forth at page 365, Laws of Missouri 1941. Likewise the same session of the General Assembly enacted Senate Bill 79, which was approved by the Governor July 31, 1941, repealing Section 11539, Revised Statutes of Missouri 1939, and enacting a new Section 11539 in lieu thereof, as set forth at page 355 Laws of Missouri 1941.

"Senate Bill 79 empowers the central committee to fill vacancies on a ticket previously nominated 'resulting from death or resignation and not otherwise,' while House Bill 502 empowers the central committee to fill vacancies on a ticket previously nominated but not limited to vacancies resulting from death or resignation. House Bill 502 also specifically empowers the central committee to fill any vacancy occurring in such committee while Senate Bill 79 apparently is silent on this point.

"Will you kindly give this office your opinion as to the proper construction of the above enactments?"

Section 11539, Laws of Missouri, 1941, page 355, reads as follows:

"The central committee of a political party shall consist of the largest body elected for the purpose of representing and acting for the party in the interim between conventions of the party. That for the purpose of making nominations to fill vacancies resulting from death or resignation and not otherwise, on a ticket previously nominated a majority of all the members-elect of a central committee shall be necessary to take action. That a central committee shall not have the power to delegate its authority to make nominations to any person or number of persons, and that any act consequent upon any such delegation of authority shall be held to be null and void. That no central committee shall have the power to substitute, to fill any vacancy, the name of any person who is not known to be of the same political belief and party as the person for whom he is substituted.

"Approved July 31, 1941."

Section 11539, Laws of Missouri, 1941, page 365, reads as follows:

"The Central Committee of a political party shall consist of the largest body elected for the purpose of representing and acting for the party in the interim between Conventions of the party. That for the purpose of making nominations to fill vacancies on a ticket previously nominated a majority of all the members-elect of a Central Committee shall be necessary to take action. That a Central Committee shall not have the power to delegate its authority to make nominations to any person or number of persons, and that any act consequent upon any such delegation of authority shall be null and void. That the Central Committee shall have the power to fill any vacancy occurring in such committee by resignation, death or otherwise of a member, by naming any person known to be

of the same political belief and party
of the person for whom he or she is sub-
stituted to fill such vacancy."

"Approved July 24, 1941."

Reference to the July 24, 1941 Act shows that provision is made for nominations to fill "vacancies," whereas, the July 31, 1941 Act provides for nominations to fill "vacancies resulting from death or resignation and not otherwise." Reference to the above described acts will also show that provision is made in the former act for power of appointment by the Central Committee to fill any vacancy occurring in such committee "by resignation, death or otherwise" of a member. This does not change the effect of the provisions in the July 31st Act.

If these two new sections of the statutes were ambiguous or were in conflict with each other, we would use certain well established rules of construction, but we are unable to see that there is either ambiguity or conflict in them. These two statutes, passed at the same session of the Legislature, taking effect at the same time and relating to the same general subject, should be construed together and if possible harmonized so as to give effect to each.

As stated in State v. Harris, 337 Mo. 1052, 87 S. W. (2d) 1026, 1. c. 1029:

"Assuming for the purpose of this case that section 4428 is a valid enactment, we have, then, two legislative acts passed at the same session of the Legislature, taking effect at the same time and relating to the same general subject. They should be construed together and if possible harmonized so as to give effect to each. Gasconade County v. Gordon et al., 241 Mo. 569, 581, 145 S. W. 1160. If, however, the statutes are necessarily inconsistent, that which deals with the common subject-matter in a minute and particular way will prevail over one of a more general nature. Gasconade County v. Gordon et al., supra. The rule is thus stated in State ex rel. County of Buchanan v. Fulks et al., 296 Mo. 614, 626, 247 S. W. 129, 132, quoting from 36 Cyc. 1151:

May 22, 1944

"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication."

"See, also, announcing the same rule, State ex inf. Attorney General v. Dabbs, 182 Mo. 359, 81 S. W. 1148; Gilkeson v. Missouri Pac. R. Co., 222 Mo. 173, 204, 121 S. W. 138, 24 L.R.A. (N.S.) 844, 17 Ann. Cas. 763; State ex rel. American Central Ins. Co. v. Gehner, 315 Mo. 1126, 1132, 280 S. W. 416, 418."

Conclusion

It is the opinion of this department that Section 11539, Laws of Missouri, 1941, page 355, and Section 11539, Laws of Missouri, 1941, page 365, are not inconsistent and when read together are in complete harmony, and full force and effect is to be accorded each section.

Respectfully submitted,

APPROVED:

RALPH C. LASHLY
Assistant Attorney General

ROY MCKITTRICK
Attorney General

RCL:EG

TRADE-MARKS:) Section 15472, R. S. 1939, pertains only to
REGISTRATION) registration of name of owner. Statute does not
OF VESSELS:) provide for registration of "bottle cases."
Application may be made for only one owner at a time.

May 22, 1944

Honorable Gregory C. Stockard
Secretary of State
Jefferson City, Missouri



Dear Mr. Stockard:

The Attorney General acknowledges receipt of a letter from your predecessor, Honorable Dwight H. Brown, dated March 31, 1944, requesting the opinion of this Department, which letter reads as follows:

"We are handing you herewith communication and application of Nehi Bottling Company for the registration of 'Nehi', 'Nehi Bottling Co', 'Par-T-Pak' and 'Royal Crown Cola', all submitted on one application, together with publisher's affidavit in duplicate, and their check for \$3.00.

"Will you kindly advise if it is within our province to accept the application in this form. From our viewpoint, it would indicate that it is possible to have 'Nehi' and 'Nehi Bottling Co' printed, stamped, engraved, etched or blown on one bottle but, to add 'Par-T-Pak' and 'Royal Crown Cola' it would be entirely two separate and distinct containers. May we have your opinion on this matter."

We are returning herewith check of Nehi Bottling Company in the sum of \$3.00, payable to Dwight H. Brown, Secretary of State, together with two copies of Publisher's Affidavit, and Form of Application for General Bottling executed by Nehi Bottling Company. The following is a copy of the enclosed "Form of Application for General Bottling":

"FORM OF APPLICATION FOR GENERAL BOTTLING

"The undersigned has adopted for use a name, mark or device to identify and make

May 22, 1944

known the ownership of bottles owned and used by the undersigned in the manufacture, sale and distribution of liquids, and has had said name, mark or device printed, stamped, engraved, etched, blown, painted, or otherwise permanently fixed upon said bottles.

"A description of said name, mark or device is as follows:

"Nehi Bottling Company

"Certain bottles and bottle cases owned and used by the NEHI BOTTLING COMPANY bear one of the following names, marks or devices: 'NEHI' 'NEHI BOTTLING CO' 'PAR-T-PAK' - ROYAL CROWN COLA'

"And you are respectfully requested to file and record the same in your office in accordance with the provisions of Section 14347, R. S. Mo., 1929.

Nehi Bottling Company
Firm Name.

by Gladys W. Buckner
Owner

Corporate Name

By _____
Pres. or Secy. "

Section 15471, R. S. Mo. 1939, reads as follows:

"Persons engaged in manufacturing, bottling or selling liquids in vessels with their name branded, engraved, blown or otherwise produced thereon, may file in the office of the recorder of deeds of the city or county in which the principal place of business of said persons is situated, and also in the office of the secretary of state, a description of the name so used by them,

and shall publish such description once in each of four successive weeks in a newspaper published in the city or county in which said description has been filed."

This section and those constituting Article 4 of Chapter 140, provide for registration in the office of the Secretary of State of the name of the owner of the vessel or bottle so that its ownership can be determined and its use prohibited by anyone other than the registered owner. We believe that when the statute states, "Persons engaged in * * bottling * * liquids in vessels with their name branded * * thereon * *," it applies to the name of the manufacturer or owner of the vessel or bottle rather than the name or trade name applying to the liquid within the vessel. This construction is borne out when considered in the light of the succeeding sections in this article.

You state, in effect, that you believe that the names "Nehi" and "Nehi Bottling Co" might properly appear on the same application but that the names "Par-T-Pak" and "Royal Crown Cola", since they are different substances and different in name, should not properly appear thereon. Having in mind the purpose for which these statutes were enacted, we believe that the only name of importance is the name of the manufacturer of the bottle or vessel. The names "Nehi," "Par-T-Pak" and "Royal Crown Cola" are trade names and designate the contents of the vessel. These names should be, and most probably are, registered under Section 15453, Article 1, Chapter 140, R. S. Mo. 1939, governing trademarks, dies and brands. "Nehi Bottling Co" is the manufacturer of the beverages named above and the owner of the bottles and is the proper and only name to be registered. The application designates further, "Certain bottles and bottle cases * *." The statute makes no provision for registration of names appearing on "bottle cases," it being confined to "vessels."

Conclusion

It is the opinion of this Department that the application made by Nehi Bottling Company by Gladys W. Buckner, Owner, is not in proper form and that publication as required by Section 15472, R. S. Mo. 1939, is improper, at least in so

Hon. Gregory C. Stockard

-4-

April 5, 1944

far as the copy of the application contained therein is concerned; that the registration required by Section 15471, supra, which was Section 14347, R. S. Mo. 1929, relates to the owner of the vessels and that only a single application should be made.

Respectfully submitted,

RALPH C. LASHLEY
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

RCL:EG

CONSTITUTIONAL AMENDMENT: Title for proposition to permit
Legislature to control school fund.

July 13, 1944.



Hon. Gregory Stockard,
Secretary of State,
Jefferson City, Missouri.

Re: Proposed Constitutional amend-
ment to repeal Secs. 8, 10,
Art. XI, and enact in lieu there-
of a new section, designated as
Sec. 8.

Dear Sir:

In accordance with your request of July 11, 1944,
there is hereinafter set forth a ballot title for the above-
proposed Constitutional amendment:

"Permitting Legislature to enact laws
governing the time and manner of in-
vestment, use, or disbursement of cap-
ital and income of county free public
school fund."

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LLB/LD

BONDS: Disapproved for failure to comply with language of the statute.

August 10, 1944

8-24
FILED
86

Hon. Gregory C. Stockard
Secretary of State
Jefferson City, Missouri

Dear Mr. Stockard:

We are in receipt of your recent letter enclosing a photostatic copy of the bond submitted by the Graham Paper Company and asking that we examine same to see whether or not it conforms with all requirements.

Section 14999 R. S. Mo., 1939 prescribes the type of bond that bidders must submit with their proposals to furnish paper to the State. A careful reading of the bond shows that the language of the statute has not been followed.

In the recent case of State vs. Sheible, 163 S. W. (2d), 559 1. c. 560, the Supreme Court of Missouri stated its oft repeated rule of construction of statutory bonds:

"Furthermore, the rule is established in this State 'where a bond is given in pursuance of a statute, courts will, in enforcing the bond, read into it the terms of the statute which have been omitted, and will likewise read out of it terms included in it that are not authorized by the statute.' State v. Wipke, 345 Mo. 283, 133 S. W. 2d 354, 357; State v. Vienup, 347 Mo. 382, 147 S. W. 2d 627."

While it is true that the rule above announced might cure any defect in the bond as furnished by the Graham Paper Company, yet we feel it is a better and safer practice to require that the bond be furnished the State in the language of the statute.

For this reason, we disapprove the bond, and in doing so, we are merely passing on same as to form.

Hon. Gregory C. Stockard

- 2 -

August 10, 1944

We are not passing on the question as to whether the bond conforms to the other requirements of the statute since in doing so, it would require that we pass on such questions as to whether the sureties are good and sufficient which we are not in a position to determine.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

MW:MB

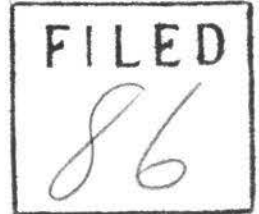
CONSTITUTIONAL
AMENDMENT.

Elections:

Title for proposition to create unicameral
legislature.

August 15, 1944.

8-19



Honorable Gregory C. Stockard,
Secretary of State,
Jefferson City, Missouri.

Re: Proposed Constitutional Amendment
creating unicameral legislature.

Dear Sir:

In accordance with your request of August 10, 1944,
there is hereinafter set forth a ballot title for the above
proposed Constitutional amendment:

"Creating unicameral Legislature, 50-75
members elected for two years; \$1200.00 -
\$1800.00 annual compensation, plus \$6.00
daily during sessions; commission appoint-
ed by Governor establishes districts."

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

LLB/LD

ELECTIONS: Mandatory for Secretary of State to prescribe weight and size of ballot for absentee soldier voting.

August 25, 1944



Honorable Gregory C. Stockard
Secretary of State
Jefferson City, Missouri

Dear Sir:

In your letter of August 24, 1944, you ask whether or not it is mandatory for the Secretary of State to prescribe the weight and size of the envelopes and ballots to be used in connection with the absentee balloting of members of the armed forces at the General Election.

Section 3, Senate Bill No. 6, 62nd General Assembly, in Special Session, provides in part:

"The maximum size and weight of the ballot for all elections for all parties shall be prescribed by the Secretary of State. * * *

* * * * *

"Notwithstanding any of the provisions of the primary or general election laws with regard to form, weight, size, content, type and color of paper of the absent voter's ballot, and envelopes, for any election covered by this Act, the clerks of the county courts, or the boards of election commissioners, in such precincts where such boards conduct elections, may, if necessary to comply with any federal regulations with respect to size and weight of such ballots, reduce the size and weight of the absentee voter's ballot, and the Secretary of State may do likewise with respect to the envelopes, without

elimination of, or addition to, the contents of the ballot. Such election officials may, for the same reasons, change or reduce the size of type to be used in the printing of the ballots.**"

It would thus appear that the Secretary of State has certain duties to perform relative to the size and weight of these ballots and envelopes. Several rules must be considered to determine whether this requirement is mandatory.

In State ex rel. Stevens v. Wurdeman, 246 S. W. 189, 194 (Mo. Sup.), it is stated:

"Usually the use of the word 'shall' indicates a mandate, and unless there are other things in a statute it indicates a mandatory statute."

It is to be specifically noticed that the clause under consideration uses the word "shall" in connection with stating the duty of the Secretary of State.

On the other hand, it is said in State ex inf. Attorney General v. Bird, 244 S. W. 938, 939:

"that, if a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory."

Section 11 of this same Act provides:

"* * * If the Secretary of State, any county clerk or any election official refuses or neglects to perform any of the duties prescribed by this Act and within the time prescribed by this Act, or shall violate any of the provisions thereof, he shall upon conviction be adjudged guilty of a misdemeanor."

It thus appears that the Act in question does prescribe the result to follow in the event the Secretary of State fails to

perform his duties, and under the rule of the Bird case, supra, it cannot be said to be directory.

In State ex rel. Dietrich v. Schado, 167 S. W. (2d) 135, 141 (Mo. App.), it is said:

"When a statute provides what results shall follow a failure to comply with its terms, it is mandatory and must be obeyed."

In view of these rules we are of the opinion that the duty imposed upon the Secretary of State with respect to prescribing the size and weight of the envelopes and ballots for the absentee voting of persons in the armed forces, is mandatory and must be exercised. However, what constitutes compliance with the statute is another question. The Secretary of State in carrying out this function in the recent primary election, sent the following instructions to the county clerks:

"FREE POSTAGE, WEIGHT AND SIZE OF BALLOTING MATERIAL. Congress has provided free postage for the transmission of the war balloting material. However, free postage is contingent upon the observance of army, navy and postal specifications as to size, weight and contents of the postal parcel. Size and weight must conform to Federal ruling in order to overcome the practical difficulties of air carriage in wartime. Earlier specifications of the army and navy limited the total weight of all the balloting material including ballots and envelopes to eight-tenths of an ounce. However, the latest instructions from the War Ballot Commission do not carry this specific weight limitation and the latest postal instructions are silent on this point. It is believed that the Federal authorities might permit some slight excess in weight, but the safest course to pursue is to reduce the weight in every possible way so as not to exceed eight-tenths of an ounce.

"PRINTING OF BALLOTS, SIZE AND WEIGHT. It is permissible for county clerks and boards of election commissioners to condense the printing and arrangement of type and reduce the size of the official war ballot according to the provisions of Senate Bill Number 6. Voting instructions must be printed on the reverse side of the official war ballot to conserve space and weight. The Secretary of State does not deem it practical to prescribe the maximum size and weight of the official war ballot due to the wide divergence of tickets in the various counties, but recommends that county clerks and boards of election commissioners give due consideration to the printing problems in connection with their respective ballots and conform to the above army, navy and postal regulations as nearly as possible. Nothing but the ballot or ballots and return envelope may be placed in the sending envelope."

You have informed us by telephone that you have a telegram from the Postal Authorities in Washington, D. C., to the effect that said agency has placed no limitation on the size and weight of this absentee balloting material. You also state you have a like telegram from the War Department.

In such circumstance the need for the Secretary of State to place a rigid limitation on the weight and size of these articles has disappeared, yet we feel the Secretary of State must nevertheless act in conformity with the statutes. We think an explanation and statement similar to that given in connection with the primary election will constitute compliance, if the underlined portion in the foregoing quotation therefrom is rephrased to read: "The envelope in which the ballot is sent to the voter shall be a No. ___, and the return envelope shall be a No. ___, or in the event such are not obtainable in the locality then the next nearest sizes thereto which may be obtained, keeping in mind that the return envelope must be of such size that it can be inserted into the envelope

Aug. 25, 1944

in which the ballot is sent to the voter. The ballot shall not be larger than is necessary to carry the ticket of the nominees who are to be voted upon (or the proposition) at the General Election in the manner required by law. The ballot and envelope shall not weigh more than ____ ounces, except in those election districts where the prescribed envelopes cannot be obtained and substitutes must be used, or where ballots of unusual length or number are to be voted upon, in which cases slight excesses are permissible."

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

LLB:EG

PROSECUTING ATTORNEYS. : Commission to Prosecuting
: Attorneys elected to new
: terms, beginning January 1,
: 1945, may issue now.

November 17, 1944

Honorable Gregory C. Stockard
Secretary of State
Jefferson City, Missouri



Dear Sir:

On November 7, 1944 at the general election held in Audrain County, Missouri, according to the official count, Mr. Adams was elected prosecutor. After the official canvass of votes was made, the county clerk certified to the Secretary of State the results of the election for Prosecuting Attorney, in the form of an abstract of the votes given for each candidate for the office. However, this abstract was included as a part thereof, in the official certification of the votes on all offices up at the general election. The abstract respecting the election for Prosecuting Attorney was sealed in the envelope along with the abstract on the offices designated in Sections 11463 and 11466, R. S. Missouri, 1939, and sent to the Secretary of State.

Section 11466 seems to indicate that this envelope cannot be opened until all the returns are in, for it provides:

"Within fifty days after such general election, and as much sooner as all the returns shall have been made, the secretary of state, in the presence of the governor, shall proceed to open the returns and cast up the votes given for all candidates for any office, except governor, lieutenant-governor, secretary of state, state auditor, state treasurer, attorney-general, railroad and warehouse commissioners and superintendent of public schools, and shall give to the persons having the highest number of votes for members of congress, from each district, certificates of their election, under his hand, with the seal of the state affixed thereto, and shall certify to the governor the names of the candidates having received the highest number of votes for the offices of judges of the supreme court, circuit courts, and St. Louis and Kansas City courts of appeals."

Nov. 17, 1944

Assuming that such is the correct view and that the law is that none of these certified abstracts may be opened until every county has made its certification, it would appear that the Governor could not issue a commission to Mr. Adams for he will have nothing upon which to base his action until the certified abstract is available to form the basis for the Secretary of State's certificate to the Governor of the name of the person elected.

However, that situation exists by reason of an irregularity on the part of the clerk in making the certification respecting the prosecutor's election. Reading of sections 11463 and 11466 clearly show that the abstract of the votes for prosecutor is not to be included in the certificate which the latter section requires to remain unopened until all returns are certified into the Secretary of State.

The certificate respecting the vote for prosecutor is governed exclusively by Section 12937, R. S. Missouri, 1939, which provides:

"The clerk of the county court of each county shall transmit to the secretary of state an abstract of the votes given for each candidate for prosecuting attorney in his county."

Section 12938, R. S. Missouri, 1939, provides:

"The secretary of state shall compare the votes given for the respective candidates, and shall certify to the governor the persons elected, respectively, to the offices of prosecuting attorney and assistant prosecuting attorney."

And section 12988 R. S. Missouri, 1939, provides:

"The attorney-general, prosecuting attorneys, the circuit attorney, the prosecuting attorney and assistant prosecuting attorneys for the City of St. Louis shall be commissioned by the governor, and shall hold their offices until their successors are elected, commissioned and qualified."

Honorable Gregory C. Stockard -3-

Nov. 17, 1944

We are informed that Mr. Adams has presented to the Secretary of State a separate abstract of the votes of Audrain County on the race for prosecuting attorney, certified to by the Clerk of that county. This is as contemplated by section 12937. There is no provision requiring this to be held for any period of time before the Secretary of State performs his duty under section 12938 and certifies to the governor the person elected. When that is done the Governor may, if he chooses, immediately issue a commission to the person elected, since there is no period fixed within which such commission may not be issued.

Respectfully submitted

LAWRENCE L. BRADLEY
Assistant Attorney General

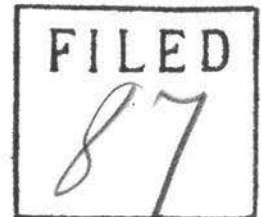
APPROVED:

ROY McKITTRICK
Attorney General

LLB:LeC

SOLDIERS: : Soldiers, sailors and marines in service or
STATE BOARD: : honorably discharged from service, or
OF HEALTH: : dependents of any soldier, sailor or
: marine shall not be charged for certified
: copies of public records in the care and
: custody and control of the State Board
: of Health, where such copy is to be
: used to establish a claim with the
: United States government.

January 11, 1944



Honorable E. B. Swift, Adjutant
Boone County Post No. 280
Veterans of Foreign Wars
811 West Ash Street
Columbia, Missouri

Dear Mr. Swift:

This office is in receipt of your letter of January 9, 1944, in which you desire an opinion on the question, whether soldiers should be charged for certified copies of birth certificates in order to prove dependency, or to establish claims with the United States government. Omitting caption and signature, the full text of your letter is as follows:

"It has just been brought the attention of Boone County Post No. 280, Veterans of Foreign Wars, that the Bureau of Vital Statistics at Jefferson City has been charging service men a fee for furnishing them with birth certificates and other information these men need in order to prove dependency, etc.

"Revised Statutes of 1939 under 15077 plainly reads that service men are to furnished any and all information they need in order to establish claims at no cost whatever.

"Does this law apply to the Bureau of Vital Statistics or can they levy a charge for information from their office?

"The Department of Missouri Veterans of Foreign Wars is holding a Council of Administration meeting in Jefferson City this week-end and I would

Jan. 11, 1944

appreciate hearing from you this week so that I can make a report on this."

That portion of our statute allowing the State Board of Health a fee for certified copies of birth or death certificates, reads as follows:

See Section 9781, R. S. Missouri, 1939

"The State Registrar shall, upon request, furnish any applicant a certified copy of the record of any birth or death registered under provisions of this article, for the making and certification of which he shall be entitled to a fee of fifty cents to be paid by the applicant. For any search of the files and records, when no certified copy is made, the State Registrar shall be entitled to a fee of fifty cents for each hour or fractional hour of time of search, to be paid by the applicant.* * * "

This section is a general law authorizing the Board of Health to charge certain fees for copies of public records under their supervision. There is, however, a subsequent section relating to soldiers and other members of our Armed Services with respect to being furnished certified copies of their records. The section which we now proceed to examine is an exception to the one previously quoted.

Section 15077 reads as follows:

"Whenever a certified copy or copies of any public record in the state of Missouri are required to perfect the claim of any soldier, sailor or marine, in service or honorably discharged, or any dependent of such soldier, sailor or marine, for a United States pension, or any other claims upon the government of the United States, they shall, upon request be furnished by the custodian of such records without any fee or compensation therefor."

These two sections relate to the same subject matter and must be read together. The latter section has special application to an exception in the case of members of our Armed Forces. The leading case of *Eagleton v. Murphy*, 156 S. W. (2d), 683, Pars. 2 and 3 will apply in this instance. This portion of this decision reads as follows:

"* * * Under the established rules of statutory construction where there are two laws relating to the same subject they must be read together and the provisions of the one having a special application to a particular subject will be deemed to be a qualification of, or an exception to, the other act, general in its terms. *State ex inf. Barrett v. Imhoff*, 291 Mo. 603, 238 S. W. 122; *State ex rel. Buchanan County v. Fulks*, 296 Mo. 614, 247 S. W. 129. * * *"

In the case of *State v. Brown*, 68 S. W. (2d), 55, Pars. 4-8, l. c. 59, we find the court making this statement:

"* * * Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' *Tavis et al. v. Foley*, 325 Mo. 1050, 1054, 30 S. W. (2d) 68, 69; *State ex rel. Buchanan County v. Fulks*, 296 Mo. 614, 626, 247 S. W. 129; *State ex inf. Barrett v. Imhoff*, 291 Mo. 603, 617, 238 S. W. 122. If there be any repugnancy between these two statutes, the general statute, section 4556, must yield to the special statute, section 5613."

In construing the act of the Legislature, now known as 15077, as it appeared in the Laws of Missouri, 1921, page 660, we may take into consideration the title of the act in construing the same, Authority to do this should be found in the following cases.

Artophone Corporation v. Coale, 153 S. W. (2d), 343.

Holder v. Elms Hotel Company, 92 S. W. (2d), 620 and

Thomas v. Buchanan County, 51 S. W. (2d), 95.

The title to the act under our scrutiny, is not ambiguous. The language is plain and simple and the construction we place on it, is this: the record to be furnished without cost to the applicant, if the record is to be used for proving a claim of any soldier, sailor or marine, or other person in the service, or honorably discharged, or where any dependent of such soldier, sailor or marine is seeking to establish a claim for pension or any other claim upon and with the government of the United States.

The rule is here established that the right of a public official to compensation must be founded upon the statute. This holding and this statement of the law will be found in Smith v. Pettis County, 136 S. W. (2d), 262, Pars. 4-6: In this case the court said:

"The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against the officer. Nodaway County v. Kidder, Mo. Sup., 129 S. W. (2d) 857; Ward v. Christian County, 341 Mo. 1115, 111 S. W. (2d) 182. * * *"

In the decision just quoted we have a situation from a leading case, that of Nodaway County v. Kidder, 129 S. W. (2d), 857 at Par.5-8. In this case here is what the court had to say:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S. W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

From our further inquiry into this matter, we find that if a public officer insists on charging a fee for a public record, where the statute expressly provides the service to be without cost, a penalty section has been enacted by the legislature. We refer you to section 15078, R. S. Mo. 1939, which in part reads as follows:

Hon. E. B. Swift

-6-

Jan. 11, 1944

"Any person or persons violating any provision of section 15077 shall be deemed guilty of a misdemeanor."

This provides a penalty for failing to furnish such record and makes it a misdemeanor for an officer who charges a fee for records pertaining to claims provided for and set out in section 15077, which we have previously set out in detail.

C O N C L U S I O N .

From the above and foregoing, it is therefore, the opinion of this office that the State Board of Health can not charge for the furnishing of certified copies of birth certificates, death certificates, or any other record in its custody and charge, where the record is requested by a soldier, sailor, marine or other person in the Armed Forces, to prove a claim upon the government of the United States, and further, the section applies to any person honorably discharged from the Armed Forces, and also this act applies to the application to the public official by any dependent of a soldier, sailor or marine whose application is made for the purpose of establishing a claim upon the United States.

Respectfully submitted

L. I. MORRIS
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General of Missouri

LIM:LeC

INHERITANCE TAX: Procedure.

March 11, 1944

3/20



Mr. Roy B. Thomson
Ryland, Stinson, Mag & Thomson
Attorneys at Law
First National Bank Building
Kansas City 6, Missouri

Dear Sir:

We are in receipt of your letter of February 1, 1944, in which you request an opinion from this department, as follows:

"I write for procedural information regarding Missouri inheritance taxes as follows: Section 583, Revised Statutes of Missouri, 1939, provides for the giving of notice before delivering certain assets to the administrator or executor. I would like to know:

"1. Is this notice or a waiver of such notice required in cases of a nonresident decedent in view of the provisions of the Act of 1941 (Acts 1941, page 281) exempting intangibles belonging to a nonresident decedent?

"2. Is it necessary for an executor or an administrator to give such notice or procure a waiver before either (a) selling intangibles belonging to the estate pursuant to the order of the Probate Court, or (b) distributing intangibles to the beneficiaries under order of Probate Court, or (c) is the notice or the waiver affected by the fact that the inheritance tax has or has not been assessed or has or has not been paid?

"3. I have before me for consideration and action a case where certain intangibles were

held by the guardian of an insane person. After the death of the ward (a) is it necessary to procure a waiver before delivering the assets to the administrator or executor, and (b) must the executor in such case give notice or procure waiver when either selling or distributing the intangibles?

"I should greatly appreciate advice from you regarding the above matters."

Section 583, R. S. Mo. 1939, reads as follows, in so far as pertinent:

" * * * No * * * person * * * having * * * assets belonging to or standing in the name of a decedent who is a resident or non-resident, * * * shall deliver or transfer the same to the executor, administrator, or legal representatives * * * unless notice of the time and place of such intended delivery or transfer be served upon the state treasurer and attorney-general at least ten days prior to said delivery or transfer; nor shall any * * * person * * * deliver * * * assets belonging to * * * decedent * * * without retaining a sufficient portion or amount thereof to pay any tax * * * which may thereafter be assessed on account of the delivery * * * unless the state treasurer and the attorney-general consent thereto in writing. And it shall be lawful for the state treasurer, together with the attorney-general, * * * to examine said securities * * * at the time of such delivery * * *. Failure to serve such notice or failure to allow such examination or failure to retain a sufficient portion * * * to pay such tax * * * shall render said * * * person * * * liable to the payment of the amount of the tax * * *."

1. This section requires notice by anyone in possession of assets belonging to an estate, whether deceased was a resi-

dent or nonresident. And this is so by the plain words of the statute.

2 (a) & (b). There are two waivers to be obtained. The first waiver is a conditional waiver, conditioned upon the making of an inventory by the executor, including all intangibles held and being transferred by the trust company, and furnishing the State Treasurer and the Attorney General with a copy of this inventory. The second waiver is a waiver issued by the State Treasurer upon the sale, for example, of stock certificates, directed to the company issuing the stock, which waiver, in effect, relieves the stock issuing company of any liability for payment of the inheritance tax due on the stock certificates. So it would be necessary to have a waiver of the latter type before the intangibles might be sold by order of the probate court or before they are distributed to the beneficiaries under court order.

2 (c). In the event that the correct amount of inheritance tax has been paid to the State Treasurer, it would still be necessary to obtain a waiver in order that the transfer agent of the corporation would be protected from the penalties provided in Section 583, supra, and if the tax has been paid, then the executor would in all likelihood have such waiver for every intangible in the estate. If the inheritance tax has not been assessed and has not been paid, then the statutes must be complied with and notice and both types of waivers obtained before the estate can properly be closed.

3. The proper procedure in each instance here is to give notice and procure waivers unless it is apparent, in the opinion of the court, that the estate is clearly not subject to the tax. In this event, the court so orders, and Section 583, supra, does not apply. Section 586, R. S. Mo. 1939, provides another case where notice and waiver is unnecessary, that is, in estates consisting of personal property only, in which event the prosecuting attorney may, with the consent of the State Treasurer, agree upon the amount with the parties liable to pay the tax, and if the court approves the agreement, then judgment shall be entered accordingly. In this case no appraiser is appointed.

Mr. Roy B. Thomson

-4-

March 11, 1944

Since these questions are all procedural, we are simply stating the generally accepted procedure and have not attempted to cite cases and authorities to support each statement made herein.

Respectfully submitted

RALPH C. LASHLY
Assistant Attorney General

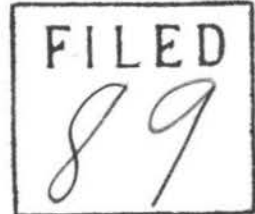
APPROVED: ,

ROY MCKITTRICK
Attorney General

RCL:HR

TAXATION Township road and bridge fund may not be
AND expended in improving streets in cities of
REVENUE the fourth class except for improving portions
 of such city streets which form connecting links
 in a system of public roads of the county.

March 27, 1944



Honorable D. D. Thomas, Jr.
Prosecuting Attorney
Carrollton, Missouri

Dear Mr. Thomas:

This is an acknowledgment of your enquiry of March 23, 1944, which is as follows:

"The town of Norborne, Carroll County, Missouri, is a town of Fourth Class. It is situated in Egypt Township and no part of the Town or Township is included in any special road district.

"Carroll County is under township organization.

"Property located within the limits of the Town of Norborne is assessed a township road and bridge tax, which tax money is used exclusively for road improvements, maintenance and repairs on roads in the Township, outside the city limits.

"On behalf of the City Officials and the Township Board, I respectfully request your opinion on the proposition of whether or not that portion of the township road and bridge fund, which is received from taxes assessed on property within the city limits may be used for improvement, repair and/or maintenance of the streets of the incorporated city?"

The above question was determined by the Supreme Court in the Case of State ex rel. v. Hackman, 270 Mo. 658, 671-2-3, in the following language:

"Upon a reconsideration of the question we have reached the conclusion that the language therein employed is too broad. What was there said was

based upon and apparently intended as in harmony with the rule announced in the cases of State ex rel. Kirkwood v. County Court, 142 Mo. 575, and Green City v. Martin, 237 Mo. 1. c. 484.

"With the holdings in those two cases, and the approval thereof in the recent case to which reference is above made, we now find no fault, but only undertake to say that they are, strictly speaking, not applicable to the issue now before us. The case of State ex rel. Kirkwood v. County Court, supra, held that a statute which undertook to authorize the county courts to pay out of the county's road and bridge fund a certain per cent thereof to the city treasurers of incorporated towns to be, by said municipalities, spent generally upon its roads and streets, was unconstitutional, because in violation of the constitutional, inhibition against grants of public money to a municipal corporation.

"In the case at bar, we are not dealing with a statute which makes a grant of public money to a municipal corporation but with a statute expressly authorized by the Constitution and which puts into operation a constitutional provision whereby money may be raised to build a connected system of public roads in the county. The fact that a portion of this fund as authorized is for the purpose of improving portions of city streets over which parts of said proposed improved roads run does not violate the constitutional provision against grants to a municipal corporation, but rather may be said to be in complete harmony with the Constitution, as amended in 1906, and under the plan contemplated the use of a part or the money in improving city sections of the proposed improved roads is for a county use or purpose (at least a quasi-county use or purpose),

as contradistinguished from a purely municipal use, as would be the case were the fund to be turned over absolutely to the municipality to be used as it might direct in purely local and general municipal street improvement. We think there is a vast difference between turning over a county fund to a municipal corporation to be spent as the municipality might direct for purely municipal functions (which was held in the above case would not be lawful), and the use of parts of the authorized county fund here involved, for improving small portions of city streets that are used to form connecting links in, or small sections of, a connected system of public roads of the county (which we now hold, in this case, to be permissible and lawful).

"The case of *Green City v. Martin*, supra, held that the township trustees of a county under township organization could not be compelled, by mandamus, at the instance of an incorporated city lying within such township, to turn over to said city a portion of said township's special road-and-bridge fund raised by taxation in 1909 under authority of the constitutional amendment of 1908 (now section 22 of article 10 of the Constitution), because at the time said taxes were levied and became due there was no statute which authorized such division of said taxes. That decision cannot be considered as in point here, and does not, we think, in any manner, conflict with the conclusions reached above.

"As expressly stated in the opinion, it was from the viewpoint of the two above cases that the above mentioned discussion was made in *State ex rel. St. Louis County v. Gordon*, supra.

"In so far, therefore, as the case of *State ex rel. St. Louis County v. Gordon* held that

a county fund could not be granted to a municipality, we think the holding is correct; but in so far as it may be said to express the thought that a portion of the proceeds of bond issued as here involved cannot be used for improving portions of city streets which form connecting links in a county system of roads, we are of the opinion, for the reasons stated in paragraph II above, that such view is an erroneous one and should not be followed."

The history of the legislation relating to the above subject, wherein the right of a city of the fourth class to participate in such road and bridge fund was involved, was reviewed by the Supreme Court in the case of Green City v. Martin, 237 Mo. 474, 484. The court there held:

"***It ordains, inter alia, that "all moneys arising therefrom shall be by the county court or township board of directors appropriated, set apart and kept . . . and . . . used for road and bridge purposes, and for no other purposes whatever." That language rivets the statute to the constitutional amendment, and, in its administrative details, points to the township board as the legal custodian and disburser of the special fund. By the same token it excludes the city. (*Expressio unius, etc.*) The force of section 11,767, if any, must be held to be spent on other road levies."

Therefore, it is the conclusion of this department that the township road and bridge fund, in counties under township organization, may not be expended in improving streets of a city of the fourth class which is within the boundary of such township, except portions of such streets as form connecting

Hon. D. D. Thomas, Jr.

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March 27, 1944

links in a system of public roads of the township.

Respectfully submitted,

SVM:EH

S. V. MEDLING
Assistant Attorney General

APPROVED

ROY MCKITTRICK
Attorney General

SPECIAL ROAD DISTRICTS: May be formed within limits of incorporated township and include area of city of fourth class.

May 16, 1944

5/23



Hon. D. D. Thomas, Jr.
Prosecuting Attorney
Carroll County
Carrollton, Missouri

Dear Mr. Thomas:

This is an acknowledgment of your letter of inquiry addressed to the General on May 11, 1944, relating to the organization of a special road district and which is as follows:

"The officials of the town of Norborne, Missouri, and the members of the Board of Egypt Township, in which said town is wholly located have jointly asked that I request your opinion, on the following:

"Carroll County is under Township organization. The town of Norborne has a population of about fifteen hundred. The residents of the town, in company with those residing in Egypt Township outside the city limits, desire to petition the County Court for the formation of a Special Road District, the boundaries of which shall be the present boundaries of said Egypt Township.

"May the real estate lying within the city limits be included in such District?

"It appears that the contemplated proceedings are governed by Section 8836 et seq, R. S. Mo. 1939."

Section 8836, R. S. Mo., 1939, is in part as follows:

"In counties now operating or which may hereafter operate under township organization, whenever it is proposed to form a special road district within the limits of one or more incorporated townships such proposed district shall be organized in the manner hereinafter prescribed.* * *"

May 16, 1944

"* * *Districts so organized may be of any dimensions that may be deemed necessary or advisable, except that every district shall be included wholly within the county organizing it and shall contain at least six hundred and forty acres of contiguous territory. * * *" (Underscoring ours.)

Section 8837 thereof is in part as follows:

"Whenever a petition, signed by the owners of a majority of the acres of land owned by residents of the county residing within the district proposed to be organized, and setting forth the proposed name of the district, and giving the boundaries thereof and the number of acres owned by each signer and the names of other owners of land residing within such boundaries so far as known, and the number of acres owned by each so far as known, and praying for the organization of a special road district in accordance with this article, shall be filed in the office of the clerk of the county court thirty days before the beginning of the next regular term of said court, the said clerk shall give notice by at least three publications in some weekly newspaper printed in the county, or by at least five handbills put up at public places within the district, of the presentation of said petition, and of the date of the beginning of the next regular term of the county court at which the same may be heard.* * *"

CONCLUSION

Therefore, it is the opinion of this department that a special road district may be organized under the provisions

Hon. D. D. Thomas, Jr.

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May 16, 1944

of Section 8836, supra, within the limits of Egypt Township and may comprehend all or any part of the area of the city of Norborne.

Respectfully submitted,

SVM:EH

S. V. MEDLING
Assistant Attorney General

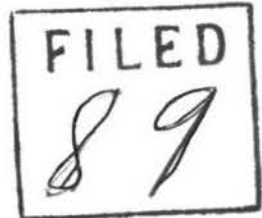
APPROVED:

ROY MCKITTRICK
Attorney General

SPECIAL ROAD AND
BRIDGE FUND:

Authority of township directors, under township organization, to use special road and bridge fund in improving or repairing any street in a city within said township.

August 14, 1944



Mr. D. D. Thomas, Jr.
Prosecuting Attorney
Carroll County
Carrollton, Missouri

Dear Sir:

Your letter of recent date has been received. It is noted that in your letter you say the following:

"Under date of March 27, 1944, your office furnished me an opinion, prepared by Mr. Medling, that township road and bridge fund, in counties under township organization, may not be expended in improving streets of a city of the fourth class which is within the boundary of such township, except portions of such streets as form connecting links in a system of public roads of the township.

"I dislike bothering you further on this matter, but at the request of the city officials of Norborne, and the township board, I now respectfully request your opinion, upon the proper interpretation of Section 8821 R. S. Mo. 1939, with particular reference to that portion thereof commencing with the word 'provided'. Is this section to be construed to mean that any street in a town such as Norborne which is not a dead end street forms a part of a continuous highway, of a township leading through the town?

"I would appreciate an opinion at the earliest date possible."

Section 8821, Article 17, Chapter 46, R. S. Missouri, 1939, is as follows:

"The township board of directors of any township may, annually, in their discretion, at the same time and in the same manner as taxes are now required by law to be levied for county purposes, levy an annual tax in addition to those now authorized by law, in any amount not exceeding twenty-five cents on each one hundred dollars valuation on all property subject to taxation in such township, to be known as a special road and bridge fund: Provided, that the part of said special road and bridge tax arising from and paid upon property not situated in any road district, special or otherwise, shall be placed to the order of the township road and bridge fund and be used in construction and maintenance of roads and improving or repairing any street in any incorporated city or village in the township, if said street shall form a part of a continuous highway of said township leading through such city or village."

Reading the provisions of said section, it would appear that it would be necessary for a street within an incorporated city in a township under township organization to form a part of a continuous highway of said township leading through such city, before the board of directors of the township would be authorized to use any part of the special road and bridge fund, authorized to be created by said section, for improving or repairing any such street.

Whether any such street in any such city in any such township would form a part of a continuous highway of said township leading through such city would undoubtedly be a question of fact involving proof of whether the street does form a part of and a link in a continuous highway of such township leading through such city.

Mr. D. D. Thomas, Jr.

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August 14, 1944

CONCLUSION

It is the opinion, therefore, of this department that in counties under township organization the special road and bridge fund may not be used in improving or repairing any street of a city in such township except where such street, under established facts, forms a part of and is a connecting link in a continuous highway of said township leading through such city.

Respectfully submitted

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

GWC:HR

ROADS:
COUNTY COURT:

Damages occasioned by relocation may not be paid by county unless road established and damages ascertained as provided by law.

November 27, 1944.

Hon. William S. Thompson,
Prosecuting Attorney
Mercer County,
Princeton, Missouri.



Dear Sir:

Your letter of August 29, 1944, is as follows:

"I desire your legal opinion on the following proposition. The old county court agreed with a landowner to relocate a road upon him and pay him the reasonable value of the property used, together with any other damages resulting therefrom. There was little question of their ability to get together on the price. No orders were made by the court in regard to said roadway but the court simply moved in and built the new road, relocated it at a substantial saving to the county over putting it in the old right-of-way.

"I desire, and so does the Mercer County Court, to get your answer to two propositions.

"First: In view of the auditor's objection to the county purchasing of right-of-ways, who in this case is entitled to pay for the right-of-way taken and appropriated by the county court in the construction of same?

"Second: Since the county desires to pay for land taken if they have a legal right to do so, is it necessary to settle the amount by the procedure set up in R. S. of Mo. Sections 8476 or can they agree on an amount and pay the same?"

The view we take of this matter does not require a specific answer to the questions asked, since, under these circumstances, the county may not pay the damages which may have been sustained by the landowner due to the relocation of this road upon his property. In your letter you say that the:

"County Court agreed with a landowner to re-locate a road upon him and pay him the reasonable value of the property used, together with any other damages resulting therefrom."

You also state:

"No orders were made by the court in regard to said roadway but the court simply moved in and built the road* * *."

Article 1, Chapter 46, R. S. No. 1939, provides a complete scheme for the establishment of roadways. It requires a petition signed by twelve freeholders and certain information to be given in said petition (Sec. 8473). Notice of the petition for such road must be given (Sec. 8474), and upon presentation of the petition the county court, upon proof the notice was given, may order the road opened. This may be either at the expense of petitioners or the county. If at the expense of the county then (Sec. 8475):

"the court shall make an order directing the county highway engineer, within sixty days thereafter, to view, mark out and survey such road, take relinquishment of the right-of-way of those who will give the same, and take the names of all owners of land, through which said road may run, and who have not given or will not give the right-of-way, and the amount of damages claimed by each one separately* * *."

Section 8476 then provides, in case someone fails to relinquish the right-of-way and claims damages, for the appointment of commissioners who shall proceed to view the premises and assess the damages. These commissioners report to the court what they find, which report is filed with the county clerk. It is then provided:

"If no exceptions be made to said report, within ten days after it is filed, the same shall be taken as a final determination of the amount of damages due any party to the proceeding, and the road shall be ordered established and opened."

Section 8478 then provides:

"If none of the parties in interest file exceptions to the report within the time fixed* * * the county court shall retain jurisdiction of the cause, and at its first sitting thereafter the court shall pay the damages awarded* * *."

This complete proceeding is the only method prescribed, whereby the county can become obligated for the damages arising from the establishment of a road. Beyond a doubt the court never had any right or jurisdiction to proceed, absent filing of the petition and giving the notice. *Dillard v. Sanderson*, 227 S.W. 658, 660 (Mo. App.).

It therefore appears that the court acted wholly without any legal authority in agreeing to pay the landowner for his damages. Section 3349 R. S. Mo. 1939, provides:

"No county * * * shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law* * *."

Back of this statute is Section 48, Article 4 of the Constitution, which provides:

"The General Assembly shall have no power to * * * authorize any county * * * to * * * pay nor authorize the payment of any claim hereafter created against * * * any county * * * under an agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

It therefore is clear that the court's agreement to pay the damages is wholly void for there was no apparent attempt made to conform to the requirements of law in fixing this claim for damages as a county liability.

Since we have concluded that the county court cannot just simply pay these damages off hand, it is not necessary to determine whether the amount thereof can be now ascertained under Section 8476. Except that we will say that that section sets forth but one step in a legal action which must be begun upon a petition and notice. To merely appoint commissioners to Assess damages, and then proceed from there, would be like starting a law suit with the jury bringing in a verdict.

CONCLUSION

It is our opinion that the county court has no authority to pay the damages arising from the relocation of a roadway

Hon. William S. Thompson,

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11-27-44

unless that roadway was established and the damages ascertained in the manner provided by law.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General.

APPROVED:

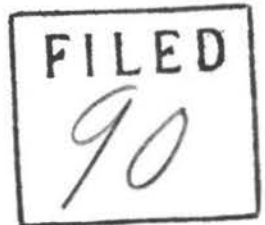
VANE C. THURLO,
(Acting) Attorney General.

LLB/LD

LABOR: Sec. 10175 authorizing 5 days' pay to be withheld by employer from employees' wages, does not control the disposition of the sums withheld.

May 29, 1944.

5/31



Mr. Orville S. Traylor,
Commissioner of Labor,
Jefferson City, Missouri.

Dear Sir:

Your letter of May 11, 1944, is as follows:

"This department has been requested to give a ruling on certain parts of Section 10175, R.S. 1939.

"1. Under this statute, can a manufacturer pay over union dues direct to the union although employees do not assign such fees to the union?

"2. If a manufacturer is required to pay over union dues direct to the union by federal laws or by federal regulations such as the War Labor Board, are they not in violation of this statute, particularly if the employee is not a member of such union?

"3. Would the above answers be influenced by the fact that the manufacturer is engaged in interstate commerce or intrastate commerce?

"We would appreciate your opinion on this section as soon as possible as we have several inquiries concerning same."

Section 10175, R. S. Mo. 1939, provides:

"The employees of the operators of all manufactories, including plate-glass manufactories, operated within this state shall be regularly paid in full of all wages due them at least once in every fifteen days, in lawful money, and at no pay day shall there be withheld from the earnings of any employee any sum to exceed the amount due him for

his labor for five days next preceding any such pay day. Any such operator who fails and refuses to pay his employees, their agents, assigns or anyone duly authorized to collect such wages, as in this section provided, shall become immediately liable to any such employee, his agents or assigns for an amount double the sum due such employee at the time of such failure to pay the wages due, to be recovered by civil action in any court of competent jurisdiction within this state, and no employee, within the meaning of this section, shall be deemed to have waived any right accruing to him under this section by any contract he may make contrary to the provisions hereof."

The pertinent part of this section applicable to the questions presented is that "at no pay day shall there be withheld from the earnings of any employee any sum to exceed the amount due him for his labor for five days next preceding any such pay day". This provision when considered with the fact that wages must be paid "every fifteen days" makes it at once apparent that on such pay day the employer may withhold approximately one-third of the employee's wages, assuming, of course, that the daily wage is fairly constant. That apparent fact makes it unnecessary to consider the situation that might arise if the withholding for union dues exceeded the amount authorized to be withheld, because no monthly dues of a union are in excess of approximately one-third of the members monthly earnings.

This leaves the question: Does this statute control what the employer shall do with the amounts withheld? The section states that "Any such operator who fails and refuses to pay his employees * * * as in this section provided" (i.e., every fifteen days, at which time five days' wages may be withheld) shall become immediately liable to any such employee * * * for an amount double the sum due, * * * to be recovered in any court of competent jurisdiction* * *." Thus it appears that the statute in no way applies to the disposition of the amount withheld. For example, assume the employee's wage is \$1.00 per day; that on pay day there is due him \$15.00, but that the employer withholds \$6.00 which is \$1.00 more than five days' pay. In such case this statute would authorize the employee to recover \$30.00 or double the amount due at the time of failure to pay the wages as prescribed in the statute, but this is all it covers.

Mr. Orville S. Traylor,

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5-29-44.

If wages, within the limit prescribed, are withheld wrongfully, or the withheld portion is wrongfully disposed of, the employee has ample redress in the courts by ordinary legal action. The dispute that would thus exist is one between the employer and employee, and is not within the terms of Section 10175 R. S. Mo. 1939.

Questions one and two presented fall in this latter category and do not come within the terms of the statute unless the amounts withheld should be in excess of that authorized. This view renders it unnecessary to consider the third question.

CONCLUSION.

It, therefore, is our opinion that Section 10175, R.S. Mo. 1939, does not apply to the amount withheld by an employer from the employee's wages, except where the sum should exceed the amount authorized to be withheld, and further that said section does not control the disposition of amounts withheld by the employer.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General.

LLB/LD

LABOR:) The word "day" as used in Section 7815, Laws of 1913,
DAY:) includes the 24-hour period from the time employee
WOMEN:) starts to work.

July 13, 1944



Honorable Orville S. Traylor
Commissioner
Labor and Industrial Inspection Department
Jefferson City, Missouri

Dear Mr. Traylor:

This is to acknowledge receipt of your letter of June 26, 1944, requesting the opinion of this Department. Your letter of request reads as follows:

"The question has arisen in connection with the construction of the word 'day' as it appears in Section 10171, R. S. 1939. The following data has been submitted for consideration:

"The Company has recently hired a number of female employees in its operating departments which are operating on a rotating shift basis seven days per week. These employees normally work six eight-hour shifts per week, but once every six weeks it becomes necessary for an employee working the last shift in the work-day and also the last shift in the work-week to continue on and work the succeeding shift which is the first shift in the next work-day, also the first shift in the next work-week. The shift changes are arranged so that sixteen hours consecutive work is periodically necessary in order to carry out the rotating shift schedule. The question which we present is, therefore, whether the word 'day' used in Section 10171, means any 24 hour period or whether it means the regular work-day.

"Under the specific example pointed out above, the employees would work 16 consecutive hours but those hours would be divided equally between two different work-days. The first eight hours would be on the third shift of one day and the succeeding eight hours would be on the first shift of the next day. Each work-day commences at 7 A.M. and continues for 24 hours."

We have heretofore under date of October 19, 1943, and November 3, 1943, rendered you opinions as to the constitutionality of Section 10171, R. S. Mo. 1939, wherein we pointed out that said section is unconstitutional and that Section 7815, Laws of Missouri, 1913, page 400, now applies. We enclose herewith copies of these opinions.

No attempt will be made to inquire into the mechanics of the system of shifts outlined in your letter but reliance will be placed on the statement made that the female employees periodically work consecutive eight-hour shifts; the first falling at the end of the work day and work week; the second starting the first day of the new work week.

It is a well established principle of statutory construction that the primary rule is to ascertain and give effect to the lawmakers' intent and that this should be done from the words used, if possible, considering the language honestly and faithfully. *City of St. Louis v. Senter Commission Company*, 337 Mo. 238, 85 S. W. (2d) 21; *Graves v. Purcell*, 337 Mo. 574, 85 S. W. (2d) 543. We stated in the enclosed opinion dated November 3, 1943, that the obvious intention of the Legislature in enacting Section 7815, page 400, Laws of Missouri, 1913, was for the protection of the health of employed women; that employment in excess of nine hours during any one day, or 54 hours during any one week, would be injurious to their health, and so was declared by this statute to be unlawful. This statute must be construed to carry out the obvious intention of the Legislature.

The word "day" has been defined many times and in its ordinary sense includes a 24-hour period between midnight of one

day and the following midnight. C. J., page 976, paragraph 26, reads as follows:

"While, as appears from the definition of the term 'day' elsewhere given, there are distinctions, according to the sense in which the term may be used, between natural, artificial, civil, solar, and astronomical days, it may be stated generally that, in the computation of the period of time measured in days and in the construction of the word 'day' as used in a contract, judicial proceeding, or statute, the law, as a general rule, adopts as the unit of measurement the calendar or natural day, that is, the period of 24 hours extending from midnight to midnight, and not a judicial day."

State v. Meagher, 101 S. W. 634, 1. c. 635, 124 Mo. App. 333, defines the word in the following manner:

"* * * Our statute does not define the day, but we must take it to mean what the term ordinarily signifies (Section 4160, R. S. 1899), that is, that it consists of 24 hours commencing and terminating at midnight."

In Williams v. Williams, 30 S. W. (2d) 69, 1. c. 71, the Supreme Court said:

"The natural or solar day consists of 24 hours, the space of time which elapses while the earth makes a complete revolution on its axis; as ordinarily construed, it is the space of time which elapses between two successive midnights."

The question presented in the opinion request is whether the day as used in Section 7815, supra, means 24 hours from midnight or whether it includes any 24-hour period. We believe that the only interpretation which could be placed upon this word, in order to carry out the Legislative intent, would

Hon. Orville S. Traylor

-4-

July 13, 1944

be that employment of a female longer than nine hours in any 24-hour period, starting from the hour of her employment, or for more than 54 hours during any one week, is prohibited, and a violation of said statute.

Respectfully submitted,

RALPH C. LASHLY
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

RCL:EG
Encs.

CHILD LABOR LAW:

EMPLOYMENT OF CHILDREN:

) Private hospitals employing children
) under 16 years of age are commercial
) enterprises, and within the child labor
laws respecting certificates of age,
type of work, maximum hours, and mini-
mum age, etc.
September 1, 1944

FILE

90

Mr. Orville S. Traylor, Commissioner
Labor and Industrial Inspection Department
State Office Building
Jefferson City, Missouri

Dear Sir:

Your letter of August 21, 1944, respecting the employment of children by private hospitals, and in which you request the opinion of this department as to the status of such hospitals, with respect to the child labor laws of this State, has been received. Your letter is as follows:

"This department is desirous of an opinion as to the status of private hospitals in regard to the child labor laws of this state. We wish to know if a hospital must comply with the child labor laws, especially in regard to certificates of age, type of work, maximum hours, and minimum age.

"These children working in hospitals are of a minimum age of twelve years and are usually hired as dishwashers for approximately three periods a day and during other parts of the day, do general cleaning, paint removing, painting, and so forth."

You submit for an opinion the questions of: first; what is the status of private hospitals in regard to the child labor laws of this State, and second; whether private hospitals are required to comply with the child labor laws of Missouri, especially in regard to certificates of age, type of work, maximum hours and minimum age, when employing children under 16 years of age.

The opinion requested requires the consideration of the terms set forth in Article 3, Chapter 56, R. S. Mo. 1939. Sections 9619 and 9620, Article 3, Chapter 56, R. S. Mo. 1939, under the title of "Employment of Children," are as follows:

(Sec. 9619)

"It shall be unlawful for any child in this state under the age of fourteen years to be employed, permitted or suffered to work at any gainful occupation except in, (a) The sale and distribution of newspapers, magazines and periodicals. (b) Agricultural labor and domestic service, or any service performed for parent or guardian."

(Sec. 9620)

"It shall be unlawful for any child in this state under the age of 16 years to be employed, permitted or suffered to work at any gainful occupation unless such employment is authorized as in this article, or otherwise by law provided: Provided, that during the hours public schools are not in session, children between the ages of twelve and sixteen years may be gainfully employed except in industries which employ more than six persons."

It will be noted that Section 9619 prohibits the employment of any child under fourteen years of age, or permitting or suffering such child to work at any gainful occupation except those mentioned in clauses "(a)" and "(b)" of said section hereinabove copied.

There is no decision by the appellate courts of Missouri, under a comparable state of facts to those involved here, determining what is "domestic service." In the case of *Barres v. Watterson Hotel Company*, 244 S. W. 308 (Ky.), the term "domestic employment" was before the Court of Appeals of Kentucky for construction and definition.

The case was one growing out of the exemption from the terms of the Workmen's Compensation Act of Kentucky of persons engaged in "domestic employment, agriculture" etc. The statute there being construed, although treating of a subject different from the one here being considered, contained language strikingly similar to the wording of our Section 9619 in defining the occupations exempted from the Act. The question to be decided therein was analogous to at least a part of the question submitted here, and the reasoning to be applied here is in parity to the reasoning adopted in that case. The Court of Appeals of Kentucky, on the question of what was "domestic service," and what was, in contrast thereto, a "business enterprise," 1. c. 309, 310, said:

"If appellant was a domestic servant, engaged in domestic employment at the time of her injury within the meaning of the act, then the demurrer should have been sustained to the answer. But was she such servant? She was, to be sure, engaged in an employment or occupation similar in many of its aspects to that generally pursued by domestics in the home. We apprehend, however, that the business of running a hotel is industrial in its nature, and not domestic in the general meaning of that word. A large hotel like the Watterson employs a great number of persons under one management, all forces being directed to the accomplishment of one purpose--the accommodation of the traveling public by supplying rooms and entertainment. This is a business. It is not a mere incident to a business. The home is an institution, not an industry. In such an institution the services of a domestic is a mere incident. A hotel is a business or industrial undertaking where persons pursue a gainful occupation in itself complete and independent, and not an incident to another business.

"Lexicographers define 'domestic' as a member of a household; inmate; one who

lives in the family of another; a hired household assistant; a house servant; of or pertaining to one's house or home, or one's household or family, relating to home life. Bouvier says that the term does not extend to a servant when employment is out of doors, and not in the house. The work of a maid at a hotel like the Watterson, while somewhat similar to the duties of a maid in a home, is an employment required in carrying on a commercial enterprise, an industry, and therefore industrial in its essence and nature, and must be regarded as coming within the provisions of the Workmen's Compensation Act. It has been held that a page boy in a hotel who sleeps on the premises and who is principally employed as a messenger, partly also to assist in dusting the reception rooms, is not within the exception, but is engaged industrially and comes within the provisions of the act. *Savoy Hotel Company v. London County Council*, 1 Q. B. 665. In the case of *Cook v. Dodge*, reported in 6 La. Ann. 276, it was held that those who receive wages and stay in the house of a person paying and employing them for services or that of his family are domestics. On the other hand, it has been held that the work of taking up carpets or mattings, and of cleaning walls, transoms, and curtains, is a necessary part of the business of keeping the rooms and hallways of a lodging house in a state of cleanliness and good order, so that an employe injured while engaged in that work is in the usual course of the trade, business, profession, or occupation of the employer who conducts the lodging house. 28 R. C. L. p. 769; *Walker v. Industrial Commission*, 177 Cal. 737, 171 Pac. 954, L. R. A. 1918F, 212."

Applying the reasoning of that court in the case above cited to the quite similar state of facts in this case, and under

a similarly worded statute as to the character of service performed by children employed in private hospitals, it is quite evident that they do not come within the exception of "domestic service" as mentioned in clause "(b)" of said Section 9619, and certainly not under any other exception named in said Section 9619.

The operation of a private hospital is not a domestic undertaking. It could not be so, and at the same time offer and provide gainful occupations to its employees. It is a commercial business and industry, comparable to a hotel, and has no lawful authority to employ children under the age of fourteen years by the terms of said Section 9619, R. S. Mo. 1939.

But coming to consider Section 9620, we find that the proviso thereof says:

"Provided, that during the hours public schools are not in session, children between the ages of twelve and sixteen years may be gainfully employed except in industries which employ more than six persons."

This proviso of the last numbered section creates an additional exception to the broad prohibitory terms of Section 9619, supra, and makes the exercise of that exception a question of fact, to-wit, whether the industry, permitted by the statute to employ children between the ages of twelve and sixteen years, during the hours public schools are not in session, does or does not employ more than six persons. If it does employ more than six persons, it would have no authority to employ such children at any time. If a less number than six persons are so employed by the industry, it may, by the terms of the proviso mentioned, employ such children at such hours as public schools are in recess, if otherwise complying with the terms of Sections 9620 and 9623.

Going back to Section 9620, we find that it states that "it shall be unlawful for any child * * * under the age of 16 years to be employed" unless such employment is authorized by Article 3, Chapter 56, R. S. Mo. 1939, or some other provision of law. The only section constituting a part of Article

3, authorizing the employment of children under sixteen years of age, except the proviso in section 9620, is Section 9623. Section 9623 makes no exception of children under sixteen years of age who must be provided with work permits before being employed or permitted to work at any gainful occupation. It includes all children under sixteen years of age who are employed in any gainful occupation. The issuing of such permits is placed, by the terms of Section 9623, exclusively in the hands of school authorities. This, apparently, for the reason that school authorities, both in fact and under our compulsory attendance school laws (See Art. 12, Chapter 72, R. S. Mo. 1939) are placed in a better position to protect children under sixteen years of age from child labor abuses, and to best conserve their educational advantages than any other statutory authority. This commitment of supervision over the issuing of such certificates of facts by school superintendents, principals, or other officials, with its attendant detailed conditions required to be complied with before such work permit may be issued, is contained in Sections 9620 and 9623, supra.

These sections do not specify or single out children of any particular age under sixteen who shall be issued permits, but the terms and conditions contained in those sections apply to all children under sixteen years of age. There are no exceptions whatever in either of those sections nor in any other section of Article 3, Chapter 56, whereby children of any age under sixteen years are left unprotected by the terms thereof, but on the contrary full compliance must be made with all of the conditions precedent, required in Section 9623, in regard to certificates of name, age, sex, place of birth, date of birth and place of residence of the children, minimum age, together with the name and place of residence of his or her parent, guardian or custodian and also the name and address of the employer and the nature of the employment - all of which must be contained in the work permit itself - before a work permit may be issued to any such child.

Full compliance must also be made with all other requirements, or their alternatives, as are set forth in said section 9623, before a work permit may be lawfully issued to a child under sixteen years of age to be employed in any gainful occupation.

Conclusion

It is, therefore, in view of the positive terms of Article 3, Chapter 56, R. S. Mo. 1939, and especially Sections 9619, 9620, 9621, 9623 and 9626 thereof, respecting the employment of children in all gainful occupations, save those excepted in Section 9619, the opinion of this department that:

First; the status of private hospitals in regard to the child labor laws of the State of Missouri is that of commercial business enterprises, and does not come within the gainful occupations excepted from the terms of Article 3, Chapter 56, R. S. Mo. 1939, specified in Section 9619 thereof.

Second; that if and when private hospitals desire to employ children of any age under the age of sixteen years to perform labor and service for them, such private hospitals are required, prior to such employment, and before a work permit can be issued to such children, to strictly and fully comply with all the terms of every section of Article 3, Chapter 56, R. S. Mo. 1939, with special regard to the requirements of Section 9623 thereof.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

GWC:EG

ELEEMOSYNARY INSTITUTIONS: How patient may be admitted to the school at Marshall--method of determining whether such person shall be sent as a County patient.

February 7, 1944



Honorable J. P. Wall, Jr.
Clerk, Ray County Court
Richmond, Missouri

Dear Mr. Wall:

We are in receipt of your request for an opinion from this Department, which request reads as follows:

"We have had filed in this court, a written request for the admission of a private patient to the Missouri State School at Marshall and we would appreciate your advising us if the county court follows the same procedure in the case of a private patient as in the case of a State patient.

"Also, please advise us if the county court has jurisdiction to refuse to admit as well as to admit a private patient when written request has been made, also if a hearing or trial is necessary.

"The case we refer to is that of a minor and we are not certain as to the exact jurisdiction or authority of the county court in the case of a parent's intent to place the minor in this institution and make payment for his support himself.

"Thanking you for furnishing us with an opinion in this matter as well as for all past favors, we remain,"

We call attention to Section 9392 R.S. Mo. 1939, which section reads as follows:

"There shall be received and gratuitously supported in the Missouri State schools,

February 7, 1944

feeble-minded and epileptics residing in the state who, if of age, are unable, or if under age, whose parents or guardians are unable to provide for their support therein, and who shall be designated as state patients. Such additional number of feeble-minded and epileptics, whether of age or under age, as can be conveniently accommodated, shall be received into the school by the managers on such terms as shall be just; and shall be designated as private patients. Feeble-minded and epileptics shall be received into the school only upon the written request of the persons desiring to send them, stating the age, place of nativity, if known, christian and surname, the town, city or county in which such persons respectively reside, and the ability of the respective parents or guardians or others to provide for their support in whole or in part, and if in part only, stating what part; and stating also the degree of relationship or other circumstances of connection between the patients and the persons requesting their admission; which statement, in all cases of state patients, must be verified by the affidavit of the petitioners and of two disinterested persons, and accompanied by the opinion of two qualified physicians, all residents of the same county with the patient, and acquainted with the facts and circumstances stated, and who must be certified to be credible by the county court of that county, or, in the case of the city of St. Louis, by the hospital commissioner or the assistant hospital commissioner of said city; and such county court; or, in the case of the city of St. Louis, the comptroller of said city, must also certify, in each case, that such patient is an eligible and proper candidate for admission to the colony. State patients, whether of age or under age, may also be received into the colony upon the official application of any judge of a court of record: Provided, that the county in which such state patients as are now inmates of said school, resided when they were admitted, and the county wherein such state patients hereinafter admitted may reside at the time of such admission, shall be liable for and shall pay into the treasury of said school the sum of five dollars per month for each of such state patients."

February 7, 1944

It will be noted from the reading of the section supra, that if a feeble-minded or epileptic person is of age and unable to defray the expense, his support shall be gratuitous, and if under age and his parents or guardian are unable to provide for his support then in that event it shall be gratuitous.

We further call attention to section 9322, R.S. Mo. 1939, which section reads as follows:

"Pay patients, or those not sent to the hospital by order of the court, may be admitted on such terms as shall be by this article and the by-laws of the hospital prescribed and regulated."

The above section is self-explanatory, we shall not dwell further on this section other than to point out and call attention to section 9323, R.S. Mo. 1939, which is a general section and provides that the Superintendent of an institution shall be furnished with a request of the form seen in section 9324, R.S. Mo. 1939. We shall not quote section 9324, feeling that mere reference is sufficient. We do, however, wish to call attention that section 9392 which we have heretofore quoted, sets forth the information that should be contained in the form as is provided in section 9324, where it is sought to place a person, regardless of age, in the school at Marshall, where he has sufficient funds of his own which are being handled by a guardian, or his parents have sufficient funds if he be a minor having or having not property in his own right. And where such a person is endeavoring to be placed in the Marshall school he must comply with Section 9325, which section provides that a certificate of two physicians shall be made and the form is set forth in said section. We shall not copy this section because we feel it is not necessary to encumber this opinion with these forms. Further, we call attention to section 9326, R.S. Mo. 1939, which provides for the form of bond that must be given. For the same reasons we do not quote this section. We further call attention to Section 9327, R.S. Mo., which provides that the patient must have proper clothing before he may be received. Having fully set forth these several sections that in our opinion must be complied with, if the person who it is sought to place in the school at Marshall, assuming that he has sufficient funds to defray his expenses, we next turn to the question of how this shall be determined. It is our view that if a guardian, or a family, or the parents of a feeble-minded person makes application to the County Court to have such person placed in the school at Marshall as a County patient, that the County Court shall proceed as they do in other cases,

to determine whether or not such person is an indigent person if he be over the age of twenty-one years or if he be a minor, then the Court shall determine whether he has property in his own right or in the hands of a guardian, or whether or not his parents have sufficient funds to defray the cost of his keep at the school. In making this determination it of course necessitates a thorough investigation into the financial ability of all parties concerned, and further necessitates a complete investigation in the determination by the Court of whether such person is a person of feeble-mind or an epileptic. After hearing all of the evidence and at the end of a complete investigation, if the Court is of the opinion that such person is not a fit and suitable person to be sent to the school at Marshall as a County charge, then the Court shall so find in their determination, having thus so determined in their order of record. If they found that such person or his parents had sufficient funds to defray his expenses then the person's guardian or parents would be forced to follow the procedure as is contained in sections 9323 - 9327, inclusive. Of course on the other hand if the Court found that he was a suitable person to be sent to the school at Marshall and so stated in the record, then he would be handled as any other County patient.

CONCLUSION.

1) If a person through his guardian or parents makes application to the County Court to be admitted at the school at Marshall as a feeble-minded or epileptic patient at the county's expense, the County Court shall have a complete hearing, and if the Court is of the opinion that such person if he be over the age of twenty-one, is indigent, or under the age of twenty-one, and that he or his parents do not have sufficient funds to defray the expenses, and that such person is feeble-minded or an epileptic, then such person shall be sent to the school at Marshall as a County charge.

2) If the County Court determined that the person whose admittance is sought in the school at Marshall either has sufficient funds in his own right to defray his expenses or that his parents have sufficient funds, then such Court shall refuse to allow the person to be admitted at the school at Marshall as a County patient and in that event if he is afterwards admitted, he must comply with sections, 9392, 9323, 9324, 9325, 9326 and 9327, R. S. Mo. 1939.

3) If a person who is to be placed in the school at Marshall for feeble-minded and epileptic patients, if such

Honorable J. P. Wall, Jr.

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February 7, 1944

person has sufficient funds in his own right or if a minor, his parents have sufficient funds to defray the cost of his upkeep at the State School at Marshall for feeble-minded and epileptic persons, and is not to be sent at the expense of the County, then the Board of Managers of the school, as is provided in section 9392, supra, shall have the determination of whether or not such person shall be admitted to the school, and at what time the facilities of the school will permit his admittance, and this is to be determined upon the application of the guardian or parents of the applicant directed to the school at Marshall, and not to the County Court of the county of his residence.

Respectfully submitted,

B. Richards Creech
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

ERC:ir

OFFICE OF PROBATE JUDGE:
VACANCY:

Elections:

Nomination of candidate where
vacancy occurs in the office by
death of the incumbent after primary
election.

August 24, 1944.



Hon. Alvin D. Walker
Prosecuting Attorney
Sullivan County
Milan, Missouri

Dear Sir:

This department is in receipt of your telegram of
August 16, 1944, which is as follows:

"Sullivan Co. elected a probate judge
at general election in 1942 for 4
years. Judge died August 13, 1944.
What is proper procedure for nomina-
tion and election to fill vacancy."

Your telegram, after setting out the facts which have
caused the vacancy in the office of probate judge of Sullivan
County, submits for reply the question: "What is proper
procedure for nomination and election to fill vacancy?"

Section 2438, R. S. Mo. 1939, provides that at the
general election in the year 1878 and every four years
thereafter a judge of probate shall be elected by the quali-
fied voters in every county.

Section 2439, R. S. Mo. 1939, provides that when a vacancy
shall occur in the office of judge of probate * * * the Governor
shall fill such vacancy by appointing some eligible person to
said office, who, when qualified, shall continue in office
until the next general election, when a successor shall be
elected for the unexpired term.

We also have Section 11509, Article 2, Chapter 76, R. S.
Mo. 1939, respecting the filling of vacancies in any public
office from any cause, which section is as follows:

"Vacancies, how filled. Whenever any vacancy,
caused in any manner or by any means whatso-
ever, shall occur or exist in any state or
county office originally filled by election

by the people, other than the office of lieutenant-governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election--at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election: Provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date."

It will be observed that Section 11509 provides that all offices in which a vacancy may occur with certain exceptions shall be filled by an appointment by the Governor which appointee shall serve until the first Monday in January following the first ensuing general election -- at which general election a person shall be elected to fill the unexpired portion of such term.

It will thus be seen that the office of judge of the probate court is not one of those excepted in Section 11509, and there is no authority given to the Governor or any other authority to call a special election to fill such vacancy. The vacancy must be filled by following the process directed in Section 11509 for all other officers, not so excepted, by putting in motion the primary and general election laws. Section 11509 has recently been before our Supreme Court in the case of State ex rel. Bothwell v. Green, County Clerk, 180 S.W. (2d) 12, advance sheets of June 13, 1944. In holding that in connection with a statute pertaining to the filling of a vacancy in any particular office, that the general statute - 11509 - on filling vacancies must be read in conjunction therewith, the court, l.c. 14, said:

"We must read in conjunction with the statute on collectors the general statute on filling vacancies. This was the ruling in State ex inf. Barker v. Koeln, 270 Mo. 174, 192 S.W. 748, in which we held it was proper to elect in an off year for the unexpired term of the office of collector a successor to one who was

appointed to fill a vacancy. It was also held in State ex inf. Major v. Amick, 247 Mo. 271, 152 S.W. 591, supra, that the general statute on filling vacancies is to be considered together with the statutes relating to the offices to which it applies. See also State ex inf. Hadley v. Herring, 208 Mo. 708, 106 S.W. 984. Clearly in this case the office became vacant upon the incumbent's death and Section 11509 furnished the authority to fill the vacancy and the conditions on which it was to be filled.

"Applying the provisions of Section 11509 to this case we find: a vacancy occurred upon the death of Greer; the vacancy was filled by the appointment of Hazel Palmer; her term under the appointment expires at the day designated for the beginning of the term, that is, March 1, after the first ensuing general election, namely, the general election to be held in November, 1944; and her successor should be elected to serve the remainder of the term at the general election in November, 1944."

This case was decided before the time for filing declarations of candidates for the primary election had expired and does not touch upon the authority of county committees to fill vacancies on party tickets. The point decided in the case was that a vacancy in any office originally filled by election by the people --with the exceptions noted--shall be filled by electing some person at the first ensuing general election to serve the remainder of the term. The strength and effect given by the Supreme Court to Section 11509 would therefore seem to demand a clarification of the apparent conflict between that section and Section 11538 and 11562 as they now stand.

Prior to the session of the legislature of Missouri, 1941, Sections 11538 and 11562 governed the filling of vacancies on a party ticket for any cause by the county committees of the respective political parties. At that session of the legislature those two sections were repealed and new sections were enacted in lieu thereof numbered 11538, page 354, and 11562, pages 353 and 354, Laws of Missouri, 1941.

With these changes in the statutes with respect to the procedure to be followed in filling vacancies on party tickets after a primary election, unless such vacancies occur by the resignation or death of such party nominee, there is much doubt as to the intent of the legislature by repealing those two

August 24, 1944.

sections and reenacting the two new sections. These new sections have not been construed by the Supreme Court or the Courts of Appeals of Missouri. There is much doubt in the minds of members of the bar and public officials as to what procedure may be employed to fill such vacancies as the one to which you call attention.

The law on this subject is in such an unsettled state that the subject matter of any opinion as to the authority of party county committees to fill such vacancies on the party tickets by naming party candidates for the November general election, unless the vacancy should occur after a primary election by the resignation or death of a person nominated at such primary election, would ultimately have to be submitted to the appellate courts to clarify such controversial questions as are involved.

Conclusion

Therefore, without undertaking to render an opinion in reply to your telegram it is respectfully suggested that a proper procedure, in the existing emergency, to submit this question to the courts for decision in time for both political parties to fill such vacancy on their party tickets for the November general election, would be for a county central committee to proceed to fill a vacancy on their party ticket by nominating some person and certifying his name to the county clerk as the party nominee, and then let a mandamus suit be filed against the county clerk by the person so nominated to compel the printing of his name on his party ticket. This procedure would be of great public benefit and would prevent possible suits to contest the right of persons to hold offices who might be placed on their party tickets and elected under the present unsettled condition of the law as to the right of county committees to act in such emergencies.

The uncertainty of the meaning of the statutes involved and the doubtful authority of county committees to fill such vacancies will finally have to be submitted to and considered and determined by our Supreme Court to decide what was the intention of the legislature on the subject when said statutes were amended. That result would best be obtained immediately in time to fill vacancies on party tickets for the following election, if the Supreme Court so decides.

Respectfully submitted

APPROVED:

GEORGE W. CROWLEY
Assistant Attorney General

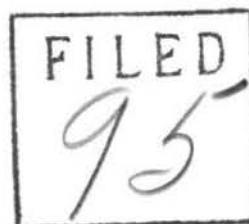
ROY McKITTRICK
Attorney General

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JUSTICES OF THE PEACE: On failure of successful candidate
for office of Justice of the Peace
DURATION OF OFFICE: to secure his commission and take
oath of office in qualifying himself
to hold office, the then present
incumbent of such office continues
to hold the office until his successor
is elected and qualified.

March 1, 1944

313



Honorable Wm. H. Wessel
Prosecuting Attorney
Gasconade County
Hermann, Missouri

Dear Sir:

This office is in receipt of your letter of February 28th, addressed to Honorable Roy McKittrick, Attorney General, and, omitting caption and date, is as follows:

"I should like an opinion at your earliest possible convenience upon the following question:

"Mr. Ferdinand Pohlmann was serving as the only Justice of the Peace in Boulware Township, Gasconade County, whose term expired December 31, 1942. Two other men were elected in 1942, but only one qualified. Is Mr. Pohlmann a legally qualified Justice yet inasmuch as one of the newly elected men did not qualify?"

Replying to your inquiry, we assume that the two men who were elected in 1942 were candidates for Justice of the Peace in Boulware Township, Gasconade County in the 1942 election. We assume also, that one of the men who made the campaign was duly elected, qualified and was duly inducted into the office of Justice of the Peace within and for Boulware Township, Gasconade County, Missouri; and that the other gentleman, who was also elected, as you state, to the office of Justice of the Peace within and for Boulware Township, Gasconade County, Missouri, did not and has not qualified for such office.

So, the situation respecting the Justices of the Peace within and for Boulware Township seems to be that one gentleman making the campaign in 1942 for the office, after election, duly certified according to law, and having qualified in all things essential to the induction into office, as you say he has, is now legally elected, qualified and an acting Justice of the Peace of said township. But the other gentleman who made the campaign in 1942 for the office of Justice of the Peace, after having been duly elected has failed to qualify for such office.

We next have to determine the official status of Mr. Ferdinand Pohlmann, the present Justice of the Peace, who was, you say, the only Justice of the Peace in said Township previous to the election of the gentleman who was duly elected and qualified in the year 1942. You do not disclose the name of this gentleman.

Under the law of the State of Missouri as affecting the duration of the office of a justice of the peace, we cite you to the following authorities:

Section 37, Article VI of the Constitution of Missouri, provides as follows:

"In each county there shall be appointed, or elected, as many justices of the peace as the public good may require, whose powers, duties and duration in office shall be regulated by law."

And, Section 2525, R. S. Mo. 1939, provides:

"Justices of the peace, as herein provided for, shall be elected at the general election to be held in eighteen hundred and eighty-two, and shall hold their offices for four years, or until their successors are elected, commissioned and qualified; but every justice of the peace now in office shall continue to act as such until the expiration of his commission, and until his successor is elected and qualified."

Assuming that Justice Ferdinand Pohlmann was legally elected to the office of Justice of the Peace of Boulware Township, under the provisions of the Constitution and the Statutes of Missouri, and having been duly qualified under his commission and oath of office, and no successor having been elected and qualified under official commission and oath of office for lawful induction into such office of Justice of the Peace, then, in such situation, Justice Pohlman continues in office until his successor is elected and qualified.

We cite the following authorities in support of this conclusion:

Knight v. Mersman, 66 Mo. App. 219; Gage v. Vail, 73 Mo. 454; Fleming v. Mulhall, 9 Mo. App. 71; State ex inf. Dabbs, 182 Mo. 359; State ex inf. Crow, Attorney-General, v. Smith, 152 Mo. 512; Section 37, Article VI, Mo. Constitution; Section 2525, R. S. Mo. 1939, supra, and Section 2527, R. S. Mo. 1939.

CONCLUSION

It is, therefore, the opinion of this department that Ferdinand Pohlmann, the present duly elected and acting Justice of the Peace of Boulware Township, holds office until his successor is duly elected and qualified.

Respectfully submitted,

E. B. WOOLFOLK
Assistant Attorney-General

APPROVED:

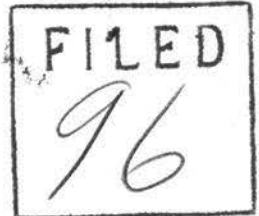
ROY McKITTRICK
Attorney-General

EBW:CP

Income Tax:

Salary of men in
service subject to
state income tax.

April 19, 1944



Mr. Cecil White
County Assessor
Pulaski County
Richland, Missouri

Dear Sir:

We have for answer your request for an official opinion
of March 24, 1944, which is as follows:

"Will you please give me your official opinion
on the following questions relative to Missouri
State Income Tax Returns for Calendar Year 1943?

1. Is the compensation of a Missouri
resident for Military service in U.S.
armed forces taxable income? In whole
or part?
2. Is the question affected by the tax-
payer's being a commissioned officer,
or by his receiving such compensation
in excess of \$1500 or below \$1500?"

The statute defining what shall be regarded as income in
this state is Section 11,345, R. S. Mo. 1939, which is
in part as follows:

"Sec. 11345. Incomes defined.--Income shall include
gains, profits, and earnings derived from salaries,
wages or compensation for personal services of
whatever kind and in whatever form paid; and from
professions, vocations, businesses, trade, commerce,
or sales or dealings in property, whether real or
personal, growing out of the ownership or the use
of any interest in real or personal property; and
from interest, rent, dividends, securities and
gains, profits and earnings from any other trans-
actions of any business carried on for gain or
profit; and from any source whatever;"

Section 11,344 sets out the classes of incomes which are declared to be exempt but there is nothing exempting the salaries of persons in the military service.

The legislature passed a law in 1943 (H.B. 630 p. 1066, Laws of 1943) which extended the time for filing of returns and the payment of the tax, but there is nothing in that Act limiting the amount to be paid or exempting any portion of the income of persons in the military service.

CONCLUSION

It is therefore the opinion of this office that, subject to the statutory deductions and the Act of 1943, the income of a resident of Missouri, who is a member of the armed service, is taxable as a whole. There being no mention made as to the amount earned being over or under \$1,500.00, or being a commissioned officer, it follows that this has no bearing upon the question.

Respectfully submitted,

GAYLORD WILKINS
Ass't. Attorney General

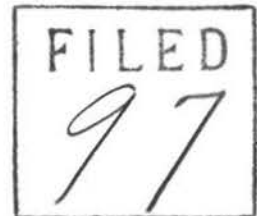
APPROVED:

ROY McKITTRICK
Attorney General

GW.sc

COUNTY COURT; The County Court has the authority to sell or
trade the county jail.

January 6, 1944



Honorable A. L. Wilson
Associate Judge
Pettis County Court
Sedalia, Missouri

Dear Judge Wilson:

We have your letter of December 16, 1943:

"On Feb. 3rd, 1938 the county court of Pettis County traded and conveyed the county jail to certain parties for a building entirely unsuited for a jail and could in no way be made to meet the requirements of a jail as contained in the statutes.

"The building obtained by the county has been sold and conveyed.

"In conveying title to the jail the commissioner appointed by the county court of 1938 erred in making deed. An opinion of the attorney examining the abstract recites that no legal title was conveyed by the county, since the commissioner failed to affix his seal to the deed.

"Now comes the grantee asking the present county court to appoint commissioners to give him legal title to said jail.

"By what authority does a county court have to barter and sell county jails, courthouses and county homes? Would it be proper for this county court to now appoint commissioners and go through formal routine of again conveying the jail building, so that a proper deed could be given by the county to conform to the attorneys opinion?

"This information will be greatly appreciated."

January 6, 1944

Your letter indicates that there is considerable doubt in your mind concerning the wisdom or necessity for obtaining a new site for the county jail.

If circumstances arise making the jail permanently unfit for further use as a jail, or its cost of repair would amount to more than the amount required to obtain another site, or other similar situations; the county court would have the authority under Chapter 100, Article 4, R. S. Mo. 1939, to abandon the old site, repair it or purchase a new one.

Section 2480 R. S. Mo. 1939 provides:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

This section gives the county court general authority to transact the business of the county. County courts are given the incidental power necessary to carry out the statutory authority granted. The court stated in the case of *Blades vs. Hawkins*, 240 Missouri 187:

"* * *While it is true the law is strict in limiting the authority of these courts, it never has been held that they have no authority except what the statutes confer in so many words. The universal doctrine is that certain incidental powers germane to the authority and duties expressly delegated, and indispensable to their performance, may be exercised."

Since this question has to do with jails and jail sites it will be necessary to examine Section 13717 R. S. Mo. 1939, which reads as follows:

"The county court of any county in this state shall have power to acquire by purchase, for such county, improved or unimproved real estate for a site for a court house, jail or poorhouse or infirmary; or,

when the county owns such site or sites, to acquire by purchase improved or unimproved real estate as an addition to or enlargement of the same; and if the county court and the owner or owners of the real estate sought to be purchased for any of said purposes cannot agree upon the compensation to be paid therefor, or if for any other reason the title thereto cannot be acquired by contract, the county court of such county may proceed, in the name and on behalf of said county, to appropriate and condemn such real estate in the manner provided by article 2 of chapter 8, R. S. 1939, and the same proceedings shall be taken as are provided in said article for the condemnation of lands for other public uses, as far as the same may be applicable."

There are no adjudicated cases in Missouri on the question of the authority of a county court to sell or trade the county jail. The county court is given the authority under this section to acquire in addition to its present site or sites, improved or unimproved, site or sites as an "addition to or enlargement of the same". Any construction must be practicable so it would seem to us that an "addition" would not necessarily mean that it would have to be contiguous to the first site as long as it was used for its intended purpose or used in connection with the first site. Several sites might be acquired if the county court in its discretion deem it advisable. The court said in the case of Security State Bank vs. Dent County, 137 S. W. (2d) 1.c. 964:

"We find nothing in the statutes requiring that real estate lawfully acquired by the county by purchase under the statutes be used immediately for the purpose for which it was acquired; nor do the statutes prevent a county court from lawfully exercising reasonable foresight for the county's future needs. Appellant presented no evidence tending to show that this lot was not needed, or would not reasonably be needed, within a reasonable time for governmental purposes." (our emphasis)

The court would have no authority to buy and sell real estate indiscriminately but would have the authority to acquire and sell within their sound decision.

Even though Section 13717 R. S. Mo. 1939, provides for acquisition by purchase, and Section 13718 R. S. Mo. 1939, provides for the payment in cash, yet the phrase "acquisition"

January 6, 1944

by purchase" includes every mode of taking title except descent or inheritance. If it proved profitable for the county court to trade the property then their action, in our opinion, would be justified.

If the county court has abused their discretion, their action may be reviewed by the courts.

CONCLUSION

The county court has authority to trade the county jail for another jail site and their authority for this and the procedure for conveyance is contained in Chapter 100, Article 4, R. S. Mo. 1939.

Respectfully submitted,

R. C. Lashly
Assistant Attorney-General

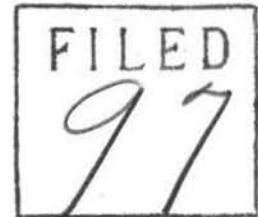
APPROVED:

ROY McKITTRICK
Attorney-General

RCL:ir

SCHOOLS; (1) Directors of school district cannot donate to the American Red Cross from funds of the "incidental fund"; (2) Directors of such school district cannot invest surplus funds in the "incidental fund" in United States bonds.

January 24, 1944



Honorable Bryan A. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Mr. Williams:

Your opinion request of January 21st has been received by this department. Such request, omitting caption and signature, is as follows:

"An opinion is desired by a number of School Districts with regard to certain disbursements of funds in the Incidental Funds of said districts:

"1. Has a school district by a unanimous vote at an annual meeting authorizing the Board of Directors to contribute to the American Red Cross out of money in the Incidental Fund to so contribute any amount, even though the exact amount to be contributed on was voted on at the annual meeting?

"It was my opinion when asked that the voters could not invest the directors with such power. Several parties agitating that procedure contend that as the taxpayers pay these funds from taxes out of the district; and that the school properties are in a state of good repairs, and they have no need for the money at present or in the near future, they were justified in authorizing the Board of Directors to contribute to the Red Cross. Their further argument is that on account of the tire situation it becomes more difficult to raise their quota. Red Cross funds are usually secured by fixing a quota by school districts in Bollinger County.

"2. In Vol. 111, No. 81, July 7, 1943 under Schools: No. 89-43 you briefly state an opinion with regard to investing surplus money in the incidental and teachers' fund in United States Bonds. The School Districts are desirous of obtaining an opinion as to whether or not the districts can invest surplus money in United States Bonds out of the Incidental Fund alone. Please advise if I am correct in assuming that your opinion is that the Board of Directors cannot invest surplus money out of the Incidental Fund."

We will first take up the question marked number one in the above request. We feel that the issue that you wish settled in this first division of your letter is whether or not money can be paid from the incidental fund of the school district to the American Red Cross in the form of a contribution of such school district.

We wish first to call your attention to Section 10366, R. S. Mo. 1939, which section is very lengthy and we will only quote that part which we think relevant to the question which you have asked, as follows:

"* * * * *

"The treasurer shall open an account for each fund specified in this section, and all moneys received from the state, county and township funds, and all moneys derived from taxation for teachers' wages, and all tuition fees, shall be placed to the credit of the 'teachers' fund', except money apportioned for free text books, which shall be credited to the 'Free Text Book Fund'. Money derived from taxation for sinking fund shall be credited to the sinking fund. Money apportioned for transportation of pupils shall be credited to the incidental fund, and money derived from taxation for annual interest shall be credited to the 'interest fund', the money derived from taxation for incidental expenses shall be credited to the 'incidental fund'. * * * * *"

It will be seen from the above quotation from Section 10366, aforesaid, that all money which has been apportioned for the transportation of pupils and all moneys derived from taxation for incidental expenses shall be credited to the "incidental fund." We have searched the statutes and decisions of this State and do not find a definition of the term "incidental fund." However, we feel that a fund of this kind should be used for the purposes of taking care of expenses which are incidental to the transaction of the business of the school district and which is not taken care of in other funds. However, we do feel that such fund should be used for the benefit of the school district and unless the expenses to be paid pertain to the business of the school district, this fund should not be used.

To substantiate our stand in this matter we wish to cite you to some definitions of "incidental expenses" which have been made in other states. In *Dunwoody v. United States*, 22 Ct. Cl. 269, 280, a matter of incidental expenses was taken up and the court held that the adjective "incidental," as used in appropriation bills to qualify the word "expenses," has a technical and well-understood meaning. And the court also held that it is usual for Congress to enumerate the principal classes of expenditures which they authorize, such as clerk hire, fuel, light, postage, telegrams, etc., and then to make a small appropriation for the minor disbursements incidental to any great business, which cannot well be foreseen, and which it would be useless to specify more accurately. For such disbursements a round sum is appropriated under the head of "incidental expenses."

Again we find that in *F. C. Austin Mfg. Co. v. Twin Brooks Tp.* S. D., 91 N. W. 470, 472, the court held the following:

"The meaning of the words 'incidental expenses,' as used in Comp. Laws Dak. Sec. 772, providing that supervisors shall have charge of such affairs of the town as are not by law committed to other officers, and they shall have power to draw orders on the town treasurer for the disbursement of such sums as may be necessary for the defraying of the incidental expenses of the town, cannot be extended so as to include other than the expenses necessarily incident to the ordinary conduct of the town business,

Jan. 24, 1944

and do not include road machines, the purchase of which was not authorized by the electors."

Therefore, it is the opinion of this department that a school district in this State would be exceeding its authority if it attempted to make contributions to various charities from the incidental fund of such school district. Although such contribution might be considered very laudable, we do not feel that incidental expenses would include such contributions. This fund known as the "incidental fund" is a fund which should be used for the payment of obligations which cannot be paid from other funds.

As to your question number two, we feel that the opinion dated May 4, 1943, written by this department to Mr. D. D. Thomas, Jr., Prosecuting Attorney, at Carrollton, Missouri, answers your question. We are attaching hereto a copy of such opinion. It was the conclusion of this department in that opinion, which was written by Mr. Harry H. Kay, formerly an Assistant Attorney-General, that the board of directors of a school district could not invest surplus money of the incidental and teachers' fund in United States bonds. The "incidental fund" and the "teachers' fund" are separate funds under the statutes of this State, and we are sure that this conclusion meant that money from either of the funds could not be used for the purpose of investing in United States bonds.

Conclusion

Therefore, it is the opinion of this department that the board of directors of a school district would not be authorized to make a donation to the American Red Cross from the "incidental fund" of such school district; and it is further the opinion of this department that the board of directors of such school district could not invest surplus money of the "incidental fund" in United States bonds.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

ACCOUNTANCY, STATE BOARD OF: Required to maintain an office in Jefferson City, Missouri, as provided by Section 14906 of the Laws of Missouri for 1943.

January 25, 1944

1-27-



Honorable D. P. Williams
President of Public Accountants' Association
of Missouri
606 Federal Commerce Trust Bldg.
St. Louis, (2), Missouri

Dear Mr. Williams:

The Attorney General wishes to acknowledge receipt of your letter of December 9, 1943, in which you request an opinion of this department. This opinion request, omitting caption and signature is as follows:

"Will you kindly refer to Section 14906 of the Missouri Statutes, which was enacted by the 62nd General Assembly and became effective November 22, 1943?

"The last line of the above referred to section reads as follows 'Said Board shall maintain its office in Jefferson City, Missouri.'

"We would be pleased to have your interpretation and ruling just what that means and to what extent is its intent and purpose?

"This phrase was added to the section by amendment of Senator Phil M. Donnelly, and we are sending him a copy of this letter for his advice as well as yours.

"Our purpose of desiring this information is that this Association will expect of the Board appointed by Governor Donnell recently, to live up to the letter of the law that made their existence possible."

The law to which you refer in this request is Section 14906, passed by the 62nd General Assembly in 1943. This law is found on page 957, of the Laws of Missouri for 1943, and provides as follows:

"The Missouri State Board of Accountancy shall have power to adopt and use a seal; to make and amend all rules deemed necessary for the proper administration of this Act; to hold hearings and conduct examinations; to administer oaths and hear testimony; to require, by summons or subpoena, the attendance and testimony of witnesses, and the production of books, papers and documents, respecting any matter under hearing or investigation, pertaining to the issuance, suspension or revocation of certificates or permits herein provided for, and falling within its jurisdiction; and to do and perform all other acts and things herein committed to their charge and administration, or incidental thereto.

"In the event any person, who shall have been duly served with summons or subpoena, shall fail or refuse to attend before the Board, or to be sworn and give testimony, or shall fail or refuse to produce books, papers or documents, the Board may complain to the Circuit Court of the Circuit or county within which such attendance or production was required, and invoke the aid of said court.

"The said court may upon any such complaint and invocation, issue an order requiring any such person so failing or refusing to testify or produce books, papers or documents, to appear before said Board, and testify, and (if the production of books, papers or documents shall have been required) to produce such books, papers and documents, and for any failure or refusal to obey such order of court any such person may be punished by said court as for a contempt thereof.

"The Board hereby created shall take possession and custody, for the purposes of this Act, of all records, equipment and funds in the custody of the Missouri State Board of Accountancy heretofore existing under the provisions of Chapter One Hundred and Fifteen (115) of the Revised Statutes of Missouri 1939. Said Board shall maintain its office in Jefferson City, Missouri. (Underscoring ours.)

It will be noted that the last sentence in the last paragraph of the above quoted statute provides that the Board of Accountancy shall maintain its office in Jefferson City, Missouri. Ordinarily "the use of the word 'shall' indicates a mandate, and unless there are other things in the statute, it indicates a mandatory statute, State ex rel. Stevens vs. Wurdeman, 246 S. W. 189, 194 (Mo. Sup.). Another citation which would tend to show that this statute is mandatory and particularly the last sentence, is Kansas City vs. J. I. Case Threshing Machine Co., 87 S. W. (2nd) 195, 205 (Mo. Sup.). In that case the court said that a statute would be construed as mandatory "where public interests are concerned and the public, or third persons have a claim de jure that the power conferred should be exercised, or whenever something is directed to be done for the sake of justice or the public good."

Of course it is a cardinal rule of construction of statutes that in construing such statutes the intention of the Legislature should be examined and carried out so far as possible. The Legislature in this case passed this particular section of the statute along with others and repealed chapter 115 of the Revised Statutes of Missouri for 1939, which formerly governed the public accountants in the State of Missouri. The provision that the Board of Accountancy should establish an office in Jefferson City, Missouri, is a new provision, and we feel that the fact that it was placed in the new 1943 law clearly shows an intention on the part of the Legislature to require the State Board of Accountancy to maintain an office in Jefferson City. We further feel that the State of Missouri has authority to prescribe where a State Board shall maintain an office, and it clearly appears in this case that the Legislature intended that such board should maintain its office at Jefferson City.

CONCLUSION

Therefore, it is the opinion of this department that the word shall in the last line of Section 14906 of the Laws of 1943 is mandatory and therefore the State Board of Accountancy must maintain an office in Jefferson City as provided by such act.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney General

APPROVED:

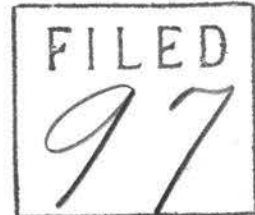
ROY McKITTRICK
Attorney General

JSP:ML

COUNTY COURT)
BUDGET

Class 5 of Section 10914, Laws of Missouri,
1941, page 652, construed.

February 4, 1944



Honorable J. W. Wight
Presiding Judge
Randolph County
Moberly, Missouri

Dear Judge Wight:

This is in reply to your opinion request,
which request was as follows:

"I have taken occasion to read an
opinion rendered by your Department
to the Honorable E. O. Shelton,
County Clerk of Randolph County,
Huntsville, Missouri, under date
of September 1, 1943.

"At page 6 of the opinion request,
class 5 of the Budget Act, reported
at page 652, Laws of Missouri, 1941,
is fully set out verbatim.

"I would like very much to have an
interpretation on what is meant by
the phrase "to be used as contingent
and emergency expenses" in said class."

For the purpose of this opinion we shall quote
verbatim class 5; Section 10914 of the Budget Act,
Laws of Missouri, 1941, page 652, which reads as
follows:

"Class 5. Contingent and emergency
expense. --The county court may transfer
any surplus funds from class 1, 2, 3 and
4 to class 5 to be used as contingent and
emergency expenses. Purposes, for which
the court proposes the funds in this
class shall be used, shall be shown."

In order to arrive at a comprehensive understanding of
this phrase we shall quote some of the cases contained
in "Words and Phrases", Volumes 9 and 14. Volume 9,
page 124, setting forth the definition "contingent ex-
penses" defined in part thusly:

"A contingent expense must be deemed to be an expense depending on some future uncertain event. *People v. Village of Yonkers, N.Y.*, 39 Barb. 266, 272."

"Contingent expenses necessarily incurred for use and benefit of county which are made proper county charges by virtue of Rev. Codes 1921, section 4952, subd. 8, are defined to mean happening of unforeseen causes or subject to unforeseen conditions, or such as are possible or liable but not certain to occur. *Brannin v. Sweet Grass County*, 293 P. 970, 972, 88 Mont. 412."

"'Contingent expenses' are such as are unknown and uncertain, which may or may not be incurred, and depend on some future uncertain event; and a city council, authorized by Comp. Laws 1913, section 3677, to levy taxes for 'contingent expenses' not otherwise provided for, may appropriate a definite maximum amount to compensate assistants to the city attorney pending litigation affecting the interests of the city. *Scott v. City of Jamestown*, 217 N. W. 668, 673, 56 N. D. 454."

From Volume 14, page 307, we also find the word "emergency" defined in part thusly:

"The word 'emergency' signifies some sudden or unexpected necessity, requiring immediate or at least quick action. *Mallon v. Board of Water Com'rs*. 128 S.W. 764, 765, 144 Mo. App. 104.

"An 'emergency' is an event or occasional combination of circumstances calling for immediate action, pressing necessity, a sudden or unexpected happening, exigency. *Colfax County v. Butler County*, 120 N.W. 444, 447, 83 Neb. 803; *Parker v. City of Monroe*, 55 So. 587, 589, 128 La. 951."

"The word 'emergency' is defined in Cent.Dict. as follows: '(2) A sudden or unexpected happening; an unforeseen occurrence or condition; specifically, a perplexing contingency or complication of circumstances. (3) A sudden or unexpected occasion for action; exigency; pressing necessity.' United States v. Sheridan-Kirk Contract Co., 149 F. 809, 814."

"'Emergency' in statute authorizing members of board of supervisors to make emergency expenditures is unforeseen occurrence of combination of circumstances calling for immediate action (Code 1930, section 6064). Attala County v. Mississippi Tractor & Equipment Co., 139 So. 628, 162 Miss. 564."

Thus from the foregoing definitions if we were endeavoring to fix a strict definition to this phrase, we must conclude that a future, unforeseen event must occur which gives rise to a necessity to spend money, in order to eradicate the condition which has been brought about by the event. The County Court in that event may transfer any surplus funds from classes 1, 2, 3 and 4 to class 5, to meet such exigency.

The foregoing definition is based upon a technical definition or interpretation of the phrase. However, it is our view that because of the nature of class 5, namely; a class in the Budget Act, it is our view that the wording is susceptible to a more liberal construction that would be indicated by the foregoing cases. We might further point out that class 5 in our opinion, was primarily enacted for the purpose of giving the County Court authority to meet unforeseen expenditures which were not liquid at the time that the budget was set up for any particular year, and with this thought in mind, we are driven to the conclusion that the phrase in class 5 simply means that when a contingency or emergency arises and has to do with the expenditure of money for a county purpose, then the County Court is empowered under class 5, supra, to meet such expenditure by transferring funds from class 1, 2, 3 and 4 to class 5. Of course, the reason for the expenditure and the necessity thereof will in every case, depend upon the situation and need at the particular time. In this opinion we cannot surmise with any certainty

any one of the multitude of events that may arise where the County Court would have the right under this class to expend money. But of course we assume that it was in every case for a county purpose. We shall next turn to the remaining portion of class 5.

It is our view from the further reading of class 5 that through the use of the word "may" that it is directory on the County Court as to whether they shall transfer any surplus funds, in other words the County Court is clothed with discretion in determining whether or not a contingent and emergency expense is necessary in the first instant. If the Court decided that such an event has arisen requiring the transfer of the surplus funds in classes 1, 2, 3 and 4 to class 5, then it is mandatory that "the purposes for which the Court proposes the funds in this class shall be used, shall be shown." For it will be noted that the Legislature used the word "shall" in the last sentence, and as pointed out heretofore, also used the word "may", also in the section thereby intending that both the words "may" and "shall" should be used in their ordinary legal sense. In this connection we call attention to the case of State vs. Wymore, 119 S. W. (2d) 941, 1.c. 944:

"* * * On reading the article it will be noted that the words 'may' and 'shall' are used many times in the several sections. They were used advisedly and must be given their usual and ordinary meaning. It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory.)

We might further point out that by the term "shall be shown" means that the County Court shall make an order in each particular instance setting forth the purposes for which the Court proposes the funds in this class shall be used. The order so made ofccourse would act as a protection for the County Treasurer and would enable the citizenry of the county to take any steps that they saw fit, should they be of the opinion that Court was over-stepping its authority.

CONCLUSION

It is the opinion of this Department that the phrase "to be used as contingent and emergency expenses" as contained in class 5 of the County Budget Act, reported at

February 4, 1944

page 652, Laws of Missouri, 1941, means that when a future, unforeseen event occurs which gives rise for the necessity to spend money, in order to meet the condition which has been brought about by the event or any unliquidated obligation, which could not be ascertained and set up at the time of the making of the budget, then the County Court in that event in their discretion, may transfer any surplus funds from classes 1, 2 3 and 4 to class 5 to meet such exigency, but must do so through suitable court order, setting forth the purposes for which the court proposes the funds under this class shall be used.

Respectfully submitted,

B. Richards Creech
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

BRC:ir

COUNTY CLERKS: Unnecessary for County Clerk to advertise
BALLOTS: for bids for printing of ballots for election.
ELECTIONS:

June 12, 1944



Honorable Shelton Williams
County Clerk
Pike County
Bowling Green, Missouri

Dear Sir:

This will acknowledge receipt of your request for
an opinion, which reads:

"I would like to have an opinion
from your office as to whether a
County Court can require a County
Clerk to Advertise, For Bids on
Election Ballots, To be printed,
For Co. elections. Especially the
War Ballots To be used, For service
men. The Pike County Court has
issued an order requesting me to
Advertise for bids on war ballots,
which may delay me in having such
ballots ready in time to comply
with the law.

"Owing to the shortage of paper
this places me in rather a peculiar
circumstance, I would appreciate
your advice on this matter, as soon
as possible."

It is my understanding that you discussed the matter
with Mr. Gaylord Wilkins, an Assistant Attorney General
in this department, who advised you that there was no

provision in the law whereby the County Court could require a County Clerk to advertise for bids on printing ballots for the election, and that you, under the law, are not required to advertise for bids.

Section 11593, R. S. Mo. 1939, provides that ballots shall be printed and distributed at public expense.

Section 11594, R. S. Mo. 1939, further provides that it shall be the duty of the Clerk of the County Court, except as in this article otherwise provided, to provide printed ballots for every election.

Section 11596, R. S. Mo. 1939, provides that the Clerk shall furnish printed ballots whenever the Secretary of State has duly certified to the Clerk any proposition to be submitted to a vote of the people.

The Sixty-second General Assembly in Extraordinary Session passed the following bills relative to furnishing absentee ballots.

Senate Bill No. 2, Sec. 11472, which is an entirely new provision in the law, and reads in part:

"* * * The official charged by law with printing and supplying ballots under the general election laws of this state, shall, at least thirty days before any election held under the provisions of this article, cause to be printed and supplied a sufficient number of ballots to be designated as "official absentee ballots" to be furnished such absentee voters under the provisions of this article."

Senate Bill No. 4, Sec. 11558, is another new provision which reads in part:

"At least forty days before the August primary in any year, when a primary election

is held, each county clerk shall prepare sample official ballots, placing thereon alphabetically, under the appropriate title of each office and party designation, the names of all candidates to be voted for in the precincts of his county. Such sample ballot shall be printed upon tinted or colored paper, and shall contain no blank endorsement or certificate. Such clerk shall forthwith submit such ticket of each party to the county chairman thereof, and mail a copy to each candidate to his post office address, as given in his declaration paper, and he shall post a copy of each sample ballot in a conspicuous place in his office. On or before the tenth day before the holding of any primary election the county clerk shall correct any errors or omissions in the ballots, cause the same to be printed and distributed, as required by law in the case of ballots for the general election, except that the number of ballots to be furnished to each precinct shall be one and a half times the number of votes cast by any party in the last preceding election and having nominees and tickets at such primary election."

Senate Bill No. 6, Sec. 3, is also a new provision in the law, and reads in part:

"Within twenty days after the time for filing candidates' affidavits for nomination for primary election has expired, and within thirty days after the primary election, it shall be the duty of the clerks of the county courts, or the boards of election commissioners in precincts where such boards conduct elections, to have 'official war ballots' printed for

use by the absentee electors described in this Act. The maximum size and weight of the ballot for all elections for all parties shall be prescribed by the Secretary of State. The form and contents of such ballot shall comply with the primary and general election laws as they now or hereafter may exist, except as to the instructions required to be placed on primary and general election ballots, and except that the ballot for primary elections for all parties shall consist of a single sheet of paper and shall be in substantially the following form: * * * * *

Sec. 5 of the same Senate Bill reads:

"The clerks of the county courts and the boards of election commissioners in cities or counties where such boards conduct elections shall cause to be prepared and printed an appropriate number of official envelopes for use in connection with official war ballots, each such envelope shall be gummed ready for sealing. Such envelopes shall be of two types and sizes. They shall be used for the following purposes and shall comply substantially with the form hereinafter set out.

"One envelope shall be sufficiently large to contain the second or smaller envelope after the official war ballot has been inserted into the smaller envelope. The larger envelope shall be used for transmitting the smaller envelope and ballot to the absentee elector and shall have printed on the front thereof substantially the following: * * * * *

We have carefully examined the foregoing statutes, and others, and no where are we able to find any statutory authority for the County Court to require the County Clerk to adver-

tise for bids to print ballots for election.

The law is well established that such an officer as the County Clerk, who is a statutory officer, has only such authority as vested in him by the statutes and the Constitution.

CONCLUSION

Therefore, it is the opinion of this department, that in the absence of any law requiring the County Clerk to advertise for such bids there is no duty on him to do so.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

ARH:CP

COUNTY COURTS: May charge County Agent office rent for rooms used by him in County Courthouse.

January 4, 1944



Honorable F. E. Wrenn
President
Cedar County Extension Association
Stockton, Missouri

Dear Sir:

The Attorney-General wishes to acknowledge receipt of your letter of December 21st, 1943, in which you request the opinion of this department. This opinion request, omitting caption and signature, is as follows:

"We would like to have a legal opinion as to whether or not the County Court has the power to charge rent for a County Agent's office in the court house.

"It is our feeling that the County Court House is a public building housing people that are working in the interests of the public, and we feel that our County Agent is working in the interests of the public just as much as any other person in the court house.

"Our County Court has sent us a court order stating that we should pay rent and that they should have a contract in their hands by the first of January, agreeing that we will.

"I believe, somewhere in the statutes of Missouri, there is reference made to this; and we would appreciate it if you would give us your opinion."

Under the provisions of Article 4, Chapter 100, of the Revised Statutes of Missouri for 1939, the various counties of this State are authorized and empowered to erect a courthouse and jail and to purchase real estate for that purpose.

Also, under such provisions there is a requirement that the county shall erect buildings for the benefit of the recorder and clerk for the purpose of preserving the records of those offices. However, under the statutes specified above there is no direct provision which provides that the county shall furnish offices for the various officers of such county. The general tenor of the statutes aforesaid, seem to be that the courthouse is erected chiefly for the purpose of providing a place in which to hold the circuit court in the various counties. However, it is a matter of common knowledge that a county courthouse is a building not only in which the circuit court is to be held but also a building in which the various county officers of the several counties shall maintain an office. It is further a matter of common knowledge that in the various counties such officers do have their offices and that such office space is furnished by the county to such officers without any charge whatsoever. There are also various statutes throughout the statute books of this State, which, for the purpose of this opinion would be useless to cite, which require that certain officers shall have their offices in the county seat and one in particular in which it is provided that the county clerk of the various counties shall maintain his office in the county courthouse.

In this particular opinion request, however, the question arises as to whether or not a County Extension Agent can be forced to pay rent in a county courthouse, which necessarily brings us to the question of whether or not such County Agent is a county officer. The exact status of the County Extension Agent is rather hard to define since the office was created in a peculiar way as far as the counties in the State of Missouri are concerned. In the Smith-Lever Act passed by the Congress of the United States provision was made for a setup of the kind now operated by the various county extension agents. The county extension agents are furnished by the University of Missouri to the various counties in the State of Missouri. There are Federal funds and also county funds which are used for the payment of their salary. There are also funds in many instances taken from the different farm bureaus which also go to the payment of the county agents' salaries. However, we have searched the statutes of the State of Missouri thoroughly and we do not find in any instance where provision is made for the employment of a county agent by the county court, nor do we find any provision which provides for the discharging of a county agent by a county court. In other words, a county agent is a person who is holding his office or

employment, first, by reason of the passage of the Smith-Lever Act, and second, by his designation to serve in a particular county by the University of Missouri. It is true, as stated above, that certain moneys are used and may be appropriated with which to partially pay his salary by the county courts of the various counties, but we do not feel that under any construction of the law a County Extension Agent can be said to be a county officer under the definitions of the term in general use. It has been the practice in many counties in this State that an order is made by the county court of the various counties for the benefit of the farm association of the county, whereby a certain amount of money is to be paid as salary to the county agent in such county and that various expenses of his office may be taken care of by the county, and doubtless in many instances provisions have been made in such order of the court that the county court shall furnish office space to such county agents.

We must assume for the purpose of this opinion, that there is no such order made by the County Court of Cedar County whereby the County Extension Agent is furnished office space in the county courthouse. Otherwise, it would be necessary for us to be informed as to the exact provisions of the order made by the County Court wherein the County Agent is to be furnished office space.

The county courts in the various counties are the custodians and managers of the courthouses in their respective counties. They have the control of such courthouses, with the possible exception of the circuit court room, and may say, within limits provided by statutes and decisions of the courts of this State, as to how such courthouses shall be operated. We do feel that a county court would not have the authority to charge rent for office space in its courthouse to the county officers whose duty it is to look after the business of the county itself. However, we do feel that in the case of a person who is not a county officer, such as a County Agent, that the county court has the right to dictate the manner in which the courthouse shall be operated and if there is room in such courthouse which is not necessary to be used for the business of the county, which the county court desires to rent, that it would have the right to rent such rooms and charge a rental fee therefor.

As a result of the above, we feel that if the county court of Cedar County wishes to rent office space to the County Agent of such county, that it may do so and that in view of the

January 4, 1944

fact that a county agent is not a county officer under the meaning of the term, that it has the authority to charge such county agent rent for the use of such room.

Conclusion

Therefore, it is the opinion of this Department that the County Court of Cedar County, in the absence of any order to the contrary whereby such County Court is to furnish office space for the County Agent, may charge the County Agent rent for any office space used by him in the county courthouse of Cedar County, Missouri.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

ROADS AND BRIDGES:

Road district levy under Section 8619 and Sec. 23, Art. 10, Mo. Const. cannot be made by county court until authorized by majority vote of road district.

January 13, 1944.



Mr. Thomas G. Woolsey,
Prosecuting Attorney
Cooper County,
Boonville, Missouri.

Dear Sir:

Your letter of December 27, 1943, presents the following question for our opinion:

May the County Court make the levy provided for in Section 8619 R. S. Mo. 1939, without a majority vote of the qualified voters of the general or special road district?

Under Section 8526, R. S. Mo. 1939, the County Courts in counties of less than 250,000 inhabitants shall at the May term each year levy upon all real and personal property a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which is to be placed to the credit of the "county road and bridge fund."

Under Section 8527, R. S. Mo. 1939, in addition to the levy provided in Section 8526, the County Court may levy a special tax not exceeding twenty-five cents on the one hundred dollars valuation, to be placed to the credit of the "special road and bridge fund." The tax collected on property lying in a road district belongs to said road district and is paid out to the proper officer of the district. The tax collected from property not lying in a road district is placed to the credit of "county road and bridge fund" provided for in Section 8526.

It seems that the districts you have in mind have in existence these two levies totaling forty-five cents, but that the commissioners of the districts in question have been arbitrarily naming a levy in excess of this forty-five cents, and the County Court has been levying each year the amount arbitrarily named under Section 8619, R. S. Mo. 1939. The levy which the court is authorized to make under Section 8619 can only be made if, prior thereto, it has been authorized as provided in Sections 8617 and 8618, R. S. Mo. 1939.

Section 8617 provides:

"Whenever ten or more qualified voters and taxpayers residing in any general or special road district in any county in this state shall petition the county court of the county in which such district is located, asking that such court call an election in such district for the purpose of voting for or against the levy of the tax provided for in section 23, article 10 of the Constitution of Missouri, adopted November 2, 1920, it shall be the duty of such court, upon the filing of such petition, to call such election forthwith to be held within 20 days from the date of filing of such petition. Such call shall be made by an order entered of record setting forth the date and place of holding such election, the manner of voting and the rate of tax the court will levy, which rate shall not exceed fifty cents on the hundred dollars assessed valuation on all property in the district. A copy of such order shall be published in two successive issues of any newspaper published in such district, if any, and if no newspaper is published in such district, three certified copies of such order shall be posted in public places in such district. The first publication in said newspaper and the posting of such notice shall be not less than ten days before the date of such election. Such court shall also select one or more judges and clerks for such election to receive the ballots and record the names of the voters."

Section 8618 provides:

"Those voting in favor of the additional tax shall have written or printed on their ballots, 'For the tax;' those voting against the tax the words, 'Against the tax.' The judge or judges shall receive the ballots and the clerks shall record the names and numbers of the voters and the judge shall place the corres-

ponding number on the ballots. The judges and clerks shall remain at such voting place from eight o'clock in the forenoon until five o'clock in the afternoon and receive and record all the ballots offered by qualified voters of the district and shall, within 24 hours after the close of such election, transmit the ballots and list of voters to the county clerk. The county clerk shall, in the presence of one or more of the judges of the county court, open and count the ballots."

Section 23, Article 10, Mo. Const., being the provision referred to in Section 8617, is as follows:

"In addition to the taxes now authorized to be levied for county purposes, under and by virtue of section 11 of article 10 of the Constitution of this State, and in addition to the special levy for road and bridge purposes authorized by section 22 of article X of the Constitution of this State, it shall be the duty of the county court of any county in this State, when authorized so to do by a majority of the qualified voters of any road district, general or special, voting thereon at an election held for such purpose to make a levy of not to exceed fifty cents on the one hundred dollars valuation on all property within such district, to be collected in the same manner as state and county taxes are collected, and placed to the credit of the road district authorizing such special levy. It shall be the duty of the county court, on petition of not less than ten qualified voters and taxpayers residing within any such road district, to submit the question of authorizing such special election to be held for that purpose, within twenty days after filing of such petition."

There can be no doubt upon reading Section 8617 and Section 23, Article 10, together, that the tax authorized cannot be levied until an election properly called and held has authorized such levy by a "majority of the qualified voters" of the road district. Not only is that fact evident from the provisions already noted, but it also appears from Section 8619 R. S. Mo. 1939, which is as follows:

"If a majority of the qualified voters voting at such election shall have voted for such additional tax, it shall be the duty of the county court to make the levy for such district, which levy shall not exceed the amount named in the order calling such election, and in no event shall exceed fifty cents on the hundred dollars of such valuation. Such levy shall be in addition to the tax which the county court is authorized to levy without a vote of the district. The tax so authorized by such district shall be collected in the same manner and at the same time as state and county taxes are collected and placed to the credit of the road district authorizing such special levy."
(Underscoring ours.)

From the foregoing it appears that the county court makes the levies under Sections 8526 and 8527 on its own motion, and does not need to have an election authorizing such action. It also appears that the tax levy authorized under Section 8619 cannot be made until authorized by a majority vote of the voters of the road district. It is that election which gives the court its authority to act. The commissioners of the district have nothing to do either with the election or the levy, and the county court cannot levy more than the amount authorized by such election.

CONCLUSION.

It therefore is our opinion that a county court may not levy a tax under Section 8619 and Section 23,

Mr. Thomas G. Woolsey,

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1-13-44.

Article 10, Missouri Constitution, upon property in road districts, until such action has been properly authorized by a majority of the qualified voters of said district at an election held for that purpose.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

LLB/LD

ELECTION: Section 11550, as enacted by the
62nd General Assembly, Extra Session,
1944, and Section 11551, Revised
Statutes of Missouri 1939, construed.

May 12, 1944

*Elections: Not necessary that receipt for filing fee
paid to party treasurer be filed simultaneously
with declaration of candidacy.*

5-15



Honorable John Woodward
County Clerk
Knox County
Edina, Missouri

Dear Sir:

We are in receipt of your letter of May 3, wherein you
request an opinion from this department which request reads as
follows:

"I respectfully request your opinion upon the
following:

"On April 25, 1944, between the hours of 9 and
12 o'clock P.M., a certain party called me to
my office and delivered to me a declaration
paper signed by Joe C. Kelley of Knox County,
Missouri, in the form set out in the Revised
Statutes, and wherein the said Joe C. Kelley
declared himself to be a candidate for the
office of Judge of the County Court upon the
Republican ticket and for the August, 1944,
primary. However, there was no receipt showing
the payment of the candidate's fee to the
Republican Central Committee. After consulting
the party about the receipt, he stated that
perhaps it had been paid, but he did not know
for sure, and he then gave me the \$5.00 filing
fee, to be delivered to the Republican Treasurer
in case the fee was not already paid.

"Also, on April 25, 1944, between the hours of
10 and 12 o'clock P.M., another party, namely,
Frank L. Sheets, called me to my office and re-
quested a declaration blank with which to file
for the office of Sheriff on the Republican
ticket for the August primary in my county.
Mr. Sheets executed the blank in proper form,

but he had no receipt from the Republican Treasurer for the filing fee. I had previously told Mr. Sheets on this same day that he would be required to produce a receipt from his County Treasurer for the filing fee to be filed with his declaration.

"Mrs. Mary Fisher, who was Treasurer of the Republican Central Committee on April 25, 1944, informs me that Mr. Kelley paid his filing fee to her before midnight on April 25, 1944, but she did not deliver this receipt to me until April 27, 1944. However, the receipt was dated April 25, 1944.

"Mr. Frank L. Sheets states that he made an attempt to pay Mrs. Mary Fisher, as Treasurer of the Republican Central Committee, the \$5.00 filing fee on the evening of April 25, 1944, but that he was unable to get any response when he called at her residence. He further states that he did not pay to her such filing fee.

"In view of the facts as heretofore stated, in your opinion would Mr. Kelley be considered a candidate for the office of Judge of the County Court and should his name be placed on the Republican ticket for the primary election or should his name be left off such ticket? And should the name of Frank L. Sheets be placed on the Republican ticket for the office of Sheriff for the August primary or should it be omitted from the ticket?

"Your immediate attention to this matter will be deeply appreciated as the time limit for making the primary election ballots is rather limited."

Section 11550, Revised Statutes of Missouri 1939, at the special session of the legislature called by the Governor in 1944, designated as the 62nd General Assembly, Extra Session, repealed Section 11550 and re-enacted said section, which section reads in part as follows:

"The name of no candidate shall be printed upon any official ballot at any primary election, unless such candidate has on or before the last Tuesday of April preceding such primary filed a written declaration, as provided in this article, * * * * *."

May 12, 1944

Section 11551, Revised Statutes of Missouri 1939, was not disturbed by the Extra Session of the legislature, a portion of which section we quote as follows:

"Each candidate, except for a township office, previous to filing declaration papers, as in this article prescribed, shall pay to the treasurer of the state or county central committee of the political party upon whose ticket he proposes as a candidate and seeks nomination, a certain sum of money, as follows, to-wit: * * * *. To the treasurer of the county central committee - five dollars, if he be a candidate for state representative or any county office; take a receipt therefor, and file such receipt with and at the time he files his declaration papers. The said sums of money, so paid by the several candidates, shall be evidence of their good faith in filing said declaration papers, * * * *."

It will be observed by comparing Section 11550, passed by the Extra Session, that it is nearly identical with Section 11550, Revised Statutes of Missouri 1939, except that the last day for filing was designated in the new section as the last Tuesday of April. Therefore, the authorities construing Section 11550 and Section 11551, Revised Statutes of Missouri 1939, are applicable to Section 11550 enacted at the extra session of the legislature.

We call attention to the case of State ex rel. Haller v. Arnold, 277 Mo., page 474, l.c. 480, wherein the court said:

"* * * * That question is: Does Section 6015 of the act supra, above quoted, absolutely require as a condition precedent to the placing by the Board of Election Commissioners of the name of a proposed non-partisan candidate on the official ballot, that the receipt of the City Treasurer for the deposit of the sum of sixty dollars shall be filed along with, and contemporaneously with the certificate of nomination of such proposed candidate?

"We have concluded that is does not. The affirmative of the question stated and presented by the facts here at issue would in our opinion and in the light of the language of the above section be too narrow a view to take of the meaning of that section. Such a view would inevitably restrict

and circumscribe the right of a citizen to be a candidate for office within such limits and hedge the privilege about with such conditions as materially to impinge upon the guarantee of the Constitution that 'all elections shall be free and open' (Section 9, Article 2, Constitution 1875.) It will be noted that the statute uses the word 'with' only, without qualifying this word by the word 'contemporaneously' or other similar word connoting, or importing, simultaneity of filing of both the receipt for the deposit and the certificate of nomination. Clearly, the language used imports and requires the filing of this receipt at the same place and with the same officer with whom such certificate of nomination is filed. * * * *

"It is manifest that any eligible candidate for office is entitled to the whole of the last day allowed by law within which to submit himself to the electors for their suffrages. In a case like this, where the proposed candidate is in no wise at fault (the argument that he should have made up his mind earlier obviously having no weight, by reason of the truth of the premise last above) ought he to be deprived of the privilege of running for a public office by the mere adventitious fact of the absence from his office, or from the city, or from the state, of the only officer from whom the required official receipt can under the letter of the law be obtained? The Treasurer might be ill, or a case can be imagined where the death of the Treasurer might occur on the last day for filing prescribed by the letter of the statute, and wherein it would be impossible to appoint his successor in time to have such successor accept the required deposit and issue the required receipt therefor. * * * *
* * * all that should be required is the earliest possible payment and obtention and filing thereafter of such receipt: provided, such filing of the receipt shall be in time to allow of the performance by the Board of Election Commissioners of the very first of the ensuing duties incumbent upon them by law. * * * *"

May 12, 1944

The view and ruling set forth in the case supra is fully sustained in the case of State ex rel. Huse v. Haden, 163 S.W. (2d) 946, 349 Mo. 982. We shall not quote from this latter case for the reason that said opinion reiterates the quotation hereto set forth from the Haller case.

Now turning to the opinion request we note that Joe C. Kelley's declaration was filed in your office on April 25th, which day was the last Tuesday in April, 1944. We further note that Mrs. Mary Fisher delivered to you a receipt of date April 25, 1944, showing that Joe C. Kelley had paid to her, as Treasurer of the Republican Central Committee, the statutory filing fee.

In this connection we call attention to the case of State ex rel. Dodd et al. v. Dye, 163 S.W. (2d) 1055, 1.c. 1057, wherein the court said;

"The receipts for the filing fees were not filed simultaneously with the declarations. Does this render the declaration void? We think not, and especially so since the agreed statement of facts shows that the fees were paid June 1, and the receipts were later filed with the respondent showing that the filing fees had been paid prior to the filing of the declarations. The receipts, at most, are evidences of payment and the time of payment. These were filed with the respondent before the time to print the ballots, and in view of the earlier payments, as shown by the receipts later filed with the respondent and accepted and marked filed by him, we think it is too technical on the part of the respondent to refuse to act when he had evidence to show that the fees were actually paid before the declarations were filed.

"We think we are sustained in this conclusion by the following cases by our Supreme Court: State ex rel. Haller v. Arnold, 277 Mo. 474, 210 S.W. 374, 375; State ex rel. Neu v. Waechter et al., 332 Mo. 574, 58 S.W. 2d 971, and State ex rel. Preisler v. Woodward et al., 340 Mo. 906, 105 S.W. 2d 912."

May 12, 1944

In view of the ruling in the case of State vs. Dye, supra, as well as the statements contained in the Haller and the Huse case, it is our view that the name of Joe C. Kelley should be placed on the ballot.

Now turning to the name of Frank L. Sheets, we assume from the reading of your opinion request that Mr. Sheets filed with you, as County Clerk, the statutory declaration, thereby complying with Section 11550, as said section was enacted by the 62nd General Assembly, Extra Session (1944). However, your opinion request is not clear as to whether or not Mr. Sheets ever placed in the hands of Mrs. Mary Fisher the statutory fee of \$5.00 and procured from her, as Treasurer of the Republican Central Committee, the receipt evidencing the payment of said fee. We are unable to determine from your request whether or not Mr. Sheets has complied with Section 11551, Revised Statutes of Missouri 1939.

We wish to call attention to the following quotation taken from the case of State ex rel. Haller v. Arnold, supra, which reads as follows:

"Provided, such filing of the receipt shall be in time to allow of the performance by the Board of Election Commissioners of the very first of the ensuing duties incumbent upon them by law."

Of course, the above statement should be construed and read in the light of the situation detailed in your opinion request, that is, instead of the words "the Board of Election Commissioners" there should be inserted the words "the County Court of Knox County."

We shall not pass upon this question in your opinion request because of the fact that the opinion request does not inform us, as heretofore stated, of the true situation, thinking possibly that after the cases set forth in this opinion have been read it can be easily determined whether or not Mr. Sheets' name should be placed upon the ballot.

As a further aid, we call attention to the case of State v. Brubaker, 177 S.W. (2d) 623. This case throws light on the question of when an instrument is filed in a court of record.

CONCLUSION

It is the opinion of this department that the name of Joe C. Kelley, a resident of Knox County, Missouri, shall be

Honorable John Woodward

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May 12, 1944

placed on the Republican ticket to be voted at the August primary election as a candidate for the office of Judge of the County Court of Knox County, Missouri.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

BRC:ml

APPROVED:

ROY McKITTRICK
Attorney General